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No. 6, Original

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

MOTION FOR CLARIFICATION OF SCOPE OF INQUIRY REFERRED TO SPECIAL MASTER AND MEMORANDUM IN SUPPORT OF MOTION

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 12, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

MOTION FOR CLARIFICATION OF SCOPE OF INQUIRY REFERRED TO SPECIAL MASTER

The United States, by its Solicitor General, respectfully moves the Court for a clarification of the scope of the inquiry referred to the Special Master in this cause, as expressed in the order of June 21, 1948, for the following reason:

After a conference and extended correspondence with the Special Master, he has announced his intention to begin hearings in California in January 1949, and take testimony relative to questions which constitute part of the ultimate issue on the merits and are wholly unnecessary to the limited matters upon which the Court has sought his recommendations. It is believed that hearings of such scope as are contemplated will inevitably result in protracted delays and are contrary to the public interest.

PHILIP B. PERLMAN,
Solicitor General.

815370—48

MEMORANDUM IN SUPPORT OF MOTION

1. *Background.* This suit was originally brought by the United States to establish its rights in the bed of the three-mile belt in the Pacific Ocean adjacent to the coast of California, extending seaward of the low-water mark, and outside of any bays, rivers, or other inland waters which join the ocean along the coast. The complaint alleged that the State had executed numerous oil leases in the disputed area, and that the lessees were extracting large quantities of petroleum in violation of the rights of the United States. The opinion of this Court, announced June 23, 1947 (332 U. S. 19), upheld the contentions of the United States, and was implemented by a decree entered October 27, 1947 (332 U. S. 804).

That decree was, of course, general in nature and did not undertake to spell out whether any particular areas were seaward or landward of the low-water mark, or whether certain submerged areas along the coast were to be treated as bays or inland waters and therefore not within the three-mile belt which was the subject of the decree. It was plain, however, that the status of certain important areas would have to be determined, although it was recognized by the parties that they might be able to agree on some of these areas. Indeed, shortly after the Court had announced its decision, and prior to the entry of the decree, counsel for both parties entered into a

stipulation which in substance undertook to fix a line across each of certain bays (San Francisco Bay, San Diego Bay, and San Pedro Bay), and which provided that the United States does not claim any portion of those bays landward of such lines. It was specifically provided, however, that the stipulation was to be without prejudice to the right of California to claim lines farther seaward in these areas.[1]

2. *The Government's Petition For a Supplemental Decree and the Appointment of the Special Master.* So far as the United States has been able to ascertain, there are only three submerged areas along the California coast from which oil is being taken.[2] And since a dispute exists between the United States and California as to each of these areas, the Government filed, on January 29, 1948, a petition for the entry of a supplemental decree, adjudicating the status of each of these three areas. The State agrees that the status of these three areas should be adjudicated. But it has never, up to this very moment, filed any document

[1] That stipulation, together with another stipulation providing for temporary management of oil properties in the submerged areas, was filed with the Court. However, the Court felt that they were not relevant to any matter then pending before the Court, and therefore ordered them stricken (332 U. S. 804, 805). These stipulations are binding upon and are being observed by the parties, and may appropriately be taken into account at the proper time.

[2] These three areas are: (a) Santa Barbara Channel, (b), the area seaward of San Pedro Bay, and (c) the area south of San Pedro Bay.

(pleading, brief, memorandum, letter or other writing) in which it has identified or even suggested any other such area from which petroleum is being extracted, and which therefore calls for adjudication with equal urgency. It nevertheless urged an adjudication of the entire coast from Oregon to Mexico. The Court, in its order of June 21, 1948, denied California's request, but indicated doubt as to what particular segments of the coast presently require determination. It therefore authorized the Chief Justice to appoint a master to make recommendations to the Court on two matters: (a) as to what particular areas call for adjudication; and (b) as to an appropriate procedure to be followed in making such determination. 334 U. S. 855, 856.

In the Government's petition for a supplemental decree with respect to the three areas mentioned above, it was suggested (pp. 10–11) that the Court might desire a conference with counsel for the respective parties for the purpose of considering and expediting the procedure to be followed in determining the conflicting claims of the parties; and it was further suggested that one or more members of the Court be designated to hold such a conference, similar to that held by Mr. Justice Black in this case on May 14, 1946. The Government has regarded the Court's order for a master, with the limited functions entrusted to him, as the substantial equivalent of what it had suggested, and it understands that his functions

are to make recommendations to the Court as to what areas require adjudication and as to what procedure should be followed. However, from the very outset, the State has envisaged activities by the Special Master of a much more elaborate character and has persuaded him to hold hearings, and take testimony with respect to matters that may perhaps be relevant on the merits as to various areas but are wholly uncalled for by the limited scope of his functions.

3. *The Proposed Hearings.* After the appointment of the Special Master, and at his request, counsel for both parties outlined their respective views by letter to the Special Master (Attorney General of California, letter dated August 6, 1948; Solicitor General of the United States, August 11, 1948). These views were widely at variance with each other and, at the request of the Special Master, a conference was held with him on September 27, 1948, at which various matters were explored.

The State had not yet identified any specific areas as to which it desired adjudication, and on October 12, 1948, in a letter to counsel for both parties, the Special Master requested the State to designate such additional segments of the coast and to furnish appropriate maps. In his concluding paragraph, he stated:

> When all of this is done, my thought is to notify counsel of a date of hearing in California, at which time the Master will

> view the several segments mentioned above, including the three described in the order of the Court, *and thereafter hear witnesses explanatory of the factors which it is claimed take all such segments out of the rule of law announced in the main opinion.* [Italics supplied.]

The Solicitor General, by letter of October 28, 1948, stated the emphatic opposition of the United States to any such hearings. In the course of that letter the Solicitor General stated:

> There is at this time no need and no sound reason for any proceedings before the Special Master involving testimony explanatory of the factors which may be claimed to take any particular segment "out of the rule of law announced in the main opinion". That is the issue on the merits, subsequently to be determined. The only matter before you is to make a recommendation to the Court as to what segments or areas require adjudication on the merits, and to suggest a procedure or technique for making such an adjudication. This involves merely a procedural recommendation, and not a determination of legal principles which are to be employed in deciding the issue on the merits. * * *
>
> * * * In our opinion, the Court does not expect you to hold hearings on the merits, as to whether any particular area is within or without "the rule of law announced in the main opinion." Although

such hearings may conceivably be necessary at a later period, after it has been determined that a particular segment calls for adjudication, they could serve no useful purpose at this time, and would operate merely as a means of delay.

The State had meanwhile, by letter dated October 27, 1948, complied with the Special Master's request to designate additional segments calling for adjudication. It identified six additional areas, with maps and accompanying descriptions of the activities in such areas.[8]

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[8] These six additional areas are: Crescent City; Arcata-Humbolt Bays; Bodega-Tomales Bays; Monterey Bay; San Luis Obispo Bay; Santa Monica Bay. Although fairly detailed descriptions of the activities in each of these areas were submitted by the State, there was not the slightest suggestion that any petroleum was being extracted from any one of them.

Plainly, even upon the basis of the facts alleged by the State, these areas do not call for adjudication as urgently as the three designated by the United States. Moreover, the United States does not oppose the eventual adjudication of the status of the additional areas; its position is simply that the three areas originally designated call for adjudication more urgently and should be dealt with first. It is wholly possible that the principles employed in determining the status of the three segments will facilitate the disposition of the problem with respect to the others. On the other hand, if all the areas were lumped together in one group, to be considered along with the original three, the probabilities of delay and confusion would be considerably enhanced. Finally, the only circumstance alleged which might present a need for ultimate adjudication in any of the additional areas arises from the presence of piers, wharves, and similar structures; but the United States has taken no steps to prevent the continued operation of such structures, and indeed has sub-

On November 16, 1948, the Special Master wrote to counsel, stating his tentative plan to begin hearings in Los Angeles in January, and to "give as much time as is necessary to a 'view' of the 'segments' of the coast line." The Solicitor General, by letter of November 18, 1948, again promptly protested the holding of any such hearings, and requested the opportunity to appear before the Special Master for the purpose of explaining further in person why such hearings should not be held. The Special Master replied by letter of November 19, 1948, in which he reaffirmed his conclusion to go forward with the proposed hearings. And on November 29, 1948, he wrote to counsel, stating that he expected to arrive in Los Angeles on January 19, 1949, and suggested that they meet with him on that day.

Although the Special Master is empowered by the order for his appointment to "hold hearings, if he finds it necessary," the hearings which are here proposed are, in our opinion, wholly foreign to the purpose for which he was appointed. His only duty is to report to the Court what areas require adjudication at this time and to suggest a procedure for such adjudication. These are matters which can be explored by conferences with counsel, similar to the pre-trial

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mitted proposed legislation to confirm such State permits as may have been issued for operations of this character. See S. 2222, 80th Cong., 2d Sess.

conference which has become familiar in the district courts. The problem at the present stage of this proceeding is not a difficult one. The United States has identified three areas which call for adjudication; the State has not disagreed, but it has cited some six additional areas. It would be a relatively simple matter to determine, on the basis of undisputed facts as to the activities in each of the areas, which of them call for present adjudication. Certainly, the configuration of the coast at these areas is not a relevant matter at this time: it is relevant only with respect to the merits. What is relevant now is whether a dispute exists as to such areas which should be adjudicated now; and, to the extent that it might be presently helpful, the configuration of the coast can be adequately seen by examination of maps. It seems inconceivable that it is necessary to "hear witnesses explanatory of the factors which it is claimed take all such segments out of the rule of law announced in the main opinion."

The vague and sweeping character of such proposal lends itself to protracted delays that would plainly be contrary to the public interest. Large amounts of petroleum are meanwhile being extracted and drained from the three areas designated by the United States, and it is important that the rights in these areas be adjudicated. The United States has proposed a procedure for

making such adjudication (letter of August 11, 1948) to the Special Master, and it is in the public interest that the areas to be presently[4] adjudicated be identified promptly and a procedure established. Such can be worked out in conjunction with counsel who are willing to cooperate, without the necessity of any such hearings as are in contemplation.

Therefore, it is respectfully requested that the Special Master be instructed:

That the scope of the inquiry referred to him does not embrace a consideration of the status of any particular area as inland waters or marginal sea, or of any evidence (historical, geographical, engineering, or otherwise) relative thereto, this being a matter for ultimate determination in respect to each segment for which adjudication is ordered; that the only problem before the Special Master in this regard is whether a dispute between the parties as to any particular area should be presently adjudicated and what procedure should be employed in making the adjudication; and that if there is no disagreement between the parties as to the activities in any particular area, the recommendation

[4] As indicated in footnote 3, *supra*, p. 7, the Government has no present objection to the eventual determination of the status of any of the additional areas designated by the State, but it believes that the principles approved in the determination of the three critical areas will lead to agreements that will limit the extent of future controversy.

of the Special Master as to the need for adjudication of the status of that area may be appropriately made upon the basis of discussions with counsel and documents submitted by them.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1948.

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October Term, 1948

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

ANSWER TO MOTION FOR CLARIFICATION OF SCOPE OF INQUIRY.

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IN THE

Supreme Court of the United States

October Term, 1948

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

ANSWER TO MOTION FOR CLARIFICATION OF SCOPE OF INQUIRY.

A "Motion for Clarification of Scope of Inquiry" has been filed by the Solicitor General of the United States. In his memorandum in support of this motion the Solicitor General takes exception to the announcement by the Special Master of his plan for proceeding in carrying out the Order of Reference made by this Court on June 21, 1948. (334 U. S. 855, 856.) We believe it is obvious that the Special Master is eminently qualified to interpret and carry out the Order of this Court and that he is proceeding to do this after careful consideration of the entire matter and after affording counsel for both parties every opportunity to present their views and suggestions on the subject. A review of the proceedings to date may be helpful to a consideration of the pending motion.

I.

Summary of Proceedings on the Reference.

(1) In January, 1948, plaintiff herein filed a Petition for Supplemental Decree requesting the fixing of the line of demarcation between the inland waters, ports, bays, harbors and tidewaters on the one hand and the three-mile belt on the other. This line, when fixed, would separate the water areas beneath which the United States was held to have paramount power from those water areas beneath which the lands and resources remain the property of the State, its grantees and lessees. However, the Solicitor General asked to have the line fixed in but three limited segments of his own selection along California's coast. The State of California filed its Answer, requesting the appointment of a Special Master and the ascertainment of the line along its entire coast. On March 25, 1948, plaintiff filed a "Memorandum in Regard to Answer," in which it opposed a reference. California filed a Reply to this memorandum, pointing out what it believes to be critical needs and renewing its request for the appointment of a Master. Briefs or memoranda were also filed by the Cities of Los Angeles and Long Beach, as *amici curiae,* in support of the answer of the State and its request for a reference.

(2) On June 21, 1948, this Court made an Order. While denying California's request "for an ascertainment of its entire coastal boundary at this time," its order provided as follows:

> "The Court is in doubt at this time as to what particular segments of the boundary, if any, should now be determined.

> "It is therefore of the opinion that a master should be appointed by the Chief Justice to make inquiry into this subject and to hold hearings, if he finds it necessary, in order to make recommendations to this Court at the October, 1948, Term, as to what particular portions of the boundary call for precise determination and adjudication. Should the master conclude that such adjudications should be made, he is also authorized to recommend to this Court an appropriate procedure to be followed in determining the precise boundary of such segments."

On July 2, 1948, the Chief Justice, pursuant to the foregoing Order, appointed the Honorable D. Lawrence Groner "Special Master in this cause," vesting authority in him to (a) summon witnesses, (b) issue subpoenas, (c) take such evidence as may be introduced, and (d) call for such evidence as he may deem necessary.

(3) On July 19, 1948, the Special Master addressed a letter jointly to the Solicitor General of the United States and the Attorney General of California requesting that they mutually confer and advise him as to their respective views upon the subject of reference, including the matter of "time requirement" and "the most expeditious and convenient plan of approach to the general subject, with especial reference to the character and nature of proof to be offered and whether verbal or documentary."

(4) Pursuant to this request counsel for the respective parties met in the office of the Attorney General of the

United States on July 28, 1948. Extended discussion was engaged in, but no agreement upon these matters resulted,—the position of the United States being that all consideration be narrowed and restricted to the three limited segments selected by it, and that no hearings should be held, view of the premises had or evidence received.

(5) Following this the Attorney General of California, on August 6, 1948, sent his reply to the Special Master, setting forth his views and the position of the State of California, and on August 11, 1948 the Solicitor General of the United States submitted his separate views.

(6) On August 27, 1948, the Special Master acknowledged receipt from counsel for each party "of a full and satisfactory letter in answer to my inquiry." He announced that since the Order of this Court requires the Master to make recommendations as to what particular portions of the boundary call for precise determination there is therein specific authorization to report on any separate portion or segment of the entire boundary and that the inquiry to be made would not necessarily be confined to the three specially-mentioned segments but would presumably permit the inclusion and designation of other segments. He stated that he wished to hear counsel, "fully and frankly," before making his conclusion on these matters and requested them to meet him in the Court House of the United States Court of Appeals in Washington, D. C., on September 27, 1948, for such a conference.

(7) This conference was held at the designated time and place. It is documented in 82 pages of transcript on file in this cause. Following the extensive discussion

which was had the Special Master announced that he would review the entire subject and advise counsel as to the course decided upon.

(8) On October 12, 1948, the Special Master addressed a letter to counsel stating that he had re-examined the views expressed at the said conference and had reached the conclusion that under the terms of the Order of Reference the State of California may designate other "segments" located on the California coast in addition to the three segments specifically named, and requested counsel for California on or before October 31st to designate additional segments of coast line which in their opinion may be said to conform to the three specifically designated segments, and to furnish maps and markings which will be useful to him "upon a view of the segments to determine whether the same may be included. . . ." He announced that when this was done his thought was to notify counsel of a date of hearing in California, when the Master would view the several segments and hear witnesses. It was stated that the Court obviously "did not intend that the Master should examine, either as a result of a personal view, or as a result of testimony, the entire coast line."

(9) Pursuant to this letter counsel for California, on October 27, 1948, submitted the requested data to the Special Master. While 104 specific areas along the California coast were listed as being completely in doubt as to status, only six were designated for inclusion in a

recommendation that their lines be ascertained at this time. These are (1) Crescent City Bay, (2) Humboldt and Arcata Bays, (3) Bodega and Tomales Bays, (4) Monterey Bay, (5) San Luis Obispo Bay, and (6) Santa Monica Boy.

(10) In letters addressed to the Special Master on both October 28 and November 18 the Solicitor General expressed "emphatic opposition" to the holding of any hearings and protested the course adopted by the Special Master in the performance of the functions assigned to him.

(11) On November 19, 1948, the Special Master assured the Solicitor General that his objections had received "the most careful consideration" and pointed out that it was his desire not to overstep, in the slightest degree, the limitations imposed upon him by the Supreme Court in the order of his appointment. After again reviewing the subject under discussion he stated his conclusion that for him to make the recommendations to the Supreme Court which he was called upon to make without a personal view and without relevant testimony of witnesses was, in his opinion, wholly out of the question.

(12) In answer to this, the Solicitor General addressed a letter to the Special Master on November 30, 1948, advising him of his preparation of a petition asking this Court to clarify the duties and functions of the Special Master, and that this would be filed as soon as printed. The Motion now pending is the result.

II.

Plaintiff's Motion Does Not Correctly Reflect the Position and Intentions of the Special Master.

The principal ground of the plaintiff's motion is that the Special Master intends to hold hearings on questions "which constitute part of the ultimate issue on the merits."

Counsel for plaintiff have failed to inform the Court that the Special Master has repeatedly stated that he did not intend to take evidence or make any recommendations as to the precise location of the line of demarcation between the "bays, rivers, or other inland waters" and the three-mile belt. That the Special Master knows precisely the scope of his authority and intends to stay within it is set forth in his letter of November 19, 1948, to the Solicitor General (copy of which was furnished to counsel for California), from which we quote:

> ". . . I am sure I need not assure you of my desire not to overstep, in the slightest degree, the limitations imposed on me by the Supreme Court in the order of my appointment. That order in specific terms directs the Master 'to make inquiry into this subject and to hold hearings, if he finds it necessary, in order to make recommendations to this court . . . as to what particular portions of the boundary call for precise determination and adjudication.'
>
> "Prior to the entry of the order of reference the United States and California had agreed and represented to the Supreme Court, that there was need of a prompt determination of the boundaries as to three specific segments of the California coast. The state, however, insisted that there was like need for determination of other and additional segments of the coast. . . . I had assumed that it was in

> response to this position of the State that the Supreme Court in the order appointing the Master provided that he should report to the court as to the three particular segments and likewise any other segment which he found called for precise determination and adjudication."

From the above there can be no question but that the Special Master intends to stay within the scope of his authority. What counsel complain of is that they have been unable to persuade the Special Master to base his recommendations wholly on their unsupported statements made in letters and at an informal conference. The Special Master feels, we believe correctly, that he should hold hearings, take evidence and hear argument, as is customary in proceedings of this nature.

Counsel for plaintiff say in their Memorandum in Support of Motion that "The United States has proposed a procedure for making such adjudication" (referring to the questions submitted by the Court to the Master). The fact of the matter is that the only "procedure" proposed by the United States is that the Master recommend to the Court that the Court proceed with the adjudication at this time of only the three segments described in their Petition for the Entry of a Supplemental Decree filed January 1948, and which the Court declined to do without first having a report and the recommendations of a Special Master.

Counsel for plaintiff further base their motion on the assumption that the order appointing a Master is the "substantial equivalent" of counsel's suggestion that a pre-trial conference be held with one of the members of the Court. (Memorandum in Support of Motion, pp. 4

and 8.) We respectfully submit there is no basis for such an assumption. California, in its Answer to the Petition for the Entry of Supplemental Decree (p. 11), suggested the appointment of a Master "to hold hearings and take evidence and make findings of fact and conclusions of law" as to the three areas referred to by plaintiff and also as to the rest of the coast line. It certainly was never contemplated, and, indeed, would hardly seem necessary, for the Court to appoint a Special Master merely to hold a pre-trial conference.

It is true that the order appointing the Special Master limited his functions to recommendations (a) "as to what particular portions of the boundary call for precise determination and adjudication" at this time and (b) what is "an appropriate procedure to be followed in determining the precise boundary of such segments." As above stated, the Master clearly understands that this is the limit of his authority, but after carefully studying the record and hearing arguments of counsel he has concluded that it will aid him in reaching a conclusion upon which he may make his recommendations *as to these matters* if he views the premises and hears testimony and argument.

For the Court to order him not to hear testimony which he believes necessary in order to reach a conclusion on the precise matters submitted to him by the Court for recommendation would be to deprive him of all discretion and a proper exercise of his judgment. In effect, what counsel ask is that he be ordered to base his recommenda-

tions solely on statements of counsel. To force the Master to do this against his will, when he thinks it necessary to hear evidence in order to be of any assistance to the Court, would be to make him merely a mouthpiece for one or the other of counsel. It is hardly conceivable that a judicial officer of the long experience and high character and ability of the former Chief Justice of the Court of Appeals of the District of Columbia is to be so deprived of all judicial discretion.

The Solicitor General appears to take the position that the Special Master is exceeding his authority and advances his suggestions as to what, and what only, the Special Master can and must do in respect of this reference. He objects to any hearings. He opposes any view by the Special Master. He states that the recommendation of the Special Master "may be appropriately made upon the basis of discussions with counsel and documents submitted by them" (p. 11).

We believe that what the Special Master has done, as well as what he proposes to do, is precisely what he is directed to do in the Order of Reference and the Order of his appointment. In our view, what is sought by the pending Motion would constitute a *new* Order of Reference, dictated by the Solicitor General and circumscribed by such limitations and restrictions as suit his desire and purpose. We deem the Special Master fully qualified to interpret and carry out the Order and direction of this Court and, in our judgment, he is doing just that.

III.

The Issues Submitted to the Master Call for the Production of Testimony.

The attitude of counsel for plaintiff in this entire matter has been predicated upon the basic fallacy that there is nothing of importance along or adjacent to the California coast line except three oil fields. Counsel argue that because California has not identified any areas which contain oil, in addition to the three described in plaintiff's Petition for Supplemental Decree, it therefore follows that there is no necessity for the present adjudication of the line of demarcation between bays or other inland waters and the three-mile belt.

In the case of *United States of America v. State of California,* the United States is the plaintiff. Its counsel prepared and filed the complaint, and the allegations thereof are its own. It was alleged that the plaintiff

> "was and now is the owner in fee simple of or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward 3 nautical miles and ***bounded on the north and south respectively by the northerly and southerly boundaries of the State of California.***"

Plaintiff's prayer was

> "that a decree be entered adjudging and declaring the rights of the United States as against the State

of California *in the area claimed by California* . . ."

This was not an action to declare the rights of the parties in an area less than 30 miles in extent along the 1,100 mile coast line of California. It affected every parcel of property in that State along the coast of the Pacific Ocean, encompassing over 3,000 square miles. It is just as important to determine the status of Crescent City Harbor in the northernmost part of California, where lumber and fishing constitute the chief occupations and resources, as well as that of Humboldt and Arcata Bays, Bodega and Tomales Bays, Monterey Bay, San Luis Obispo Bay, and Santa Monica Bay, not to mention many other areas, as it is to determine the status of the three restricted areas defined in the Petition for Supplemental Decree. It is proper, we believe, and clearly within the scope of the Order of Reference that other similar segments or areas receive consideration as well.

The Solicitor General insists upon restricting all consideration and all recommendations to such areas only in which petroleum is known to exist. From the 1,100 miles of California's coast line three areas encompassing less than 30 miles were selected and all consideration of any other areas in doubt has been persistently opposed by him. While California, in compliance with the request of the Special Master of October 12, 1948, named 104 areas whose status is wholly obscure at this time, only 6 areas from this number were submitted by it for inclusion

as segments to receive consideration in addition to the 3 named in the Plaintiff's Petition for Supplemental Decree.

The obvious truth is that the Court's decree of October 27, 1947, applies with equal force in the entire area lying seaward of the California coast line and outside of inland waters. This decree plainly clouds the title to all land fronting on the coast of California from Oregon to Mexico, and until the line of demarcation is fixed with such accuracy that it can be located on the ground, no one desiring to conduct any operations or deal in any way with real property or property rights along this coast can know where the rights of the State and its grantees end and those of the Federal Government begin. It was for this reason that California urged that the entire line from Mexico to Oregon be fixed in the present proceeding.

It is of course true that on some sections of the coast line there is less activity, with resulting less urgency for adjudication, than on others. This may have been in the Court's mind when it denied California's request for an adjudication of the entire coast line. However, there are segments of the coast line where the need for adjudication is of equally as great urgency as the need in the three segments especially named. As but one example of several that could be cited, we refer to the Motion of the City of Los Angeles for Leave to File a Memorandum as *Amicus Curiae* in Support of California's Answer to the Petition for Supplemental Decree. In this memorandum

(pp. 6 and 12) the City has described the urgent necessity for determining the status and limits of Santa Monica Bay, pointing out that fills and improvements on the submerged lands in Santa Monica Bay are contemplated which will involve the expenditure of several million dollars and that the title to this area is now and will continue to be clouded and left in suspense until the line of demarcation is accurately determined.

The mere fact that the Federal Government has as yet taken no action regarding piers, wharves and similar structures, as alleged by plaintiff on page 7 of its Memorandum in Support of Motion, does not clear the title or settle the question of ownership of this immensely valuable property within the City of Los Angeles or of any other property along the coast.

The Court has asked the Special Master to recommend to it what particular areas or segments of the coast line call for adjudication. There is sharp disagreement between the parties as to this question. This disagreement can be resolved only by hearing evidence, both oral and documentary, as to the necessities which exist in the various areas which are submitted to the Master at his request in the State's letter of October 27, 1948.

IV.

The Inclusion of Other Areas Will Not Cause Delay.

The State disagrees with the view of counsel for plaintiff that the inclusion of other areas or segments of the coast line in the present proceeding will cause protracted, or any, delays. On the contrary, the State believes that it will facilitate the ultimate conclusion of the litigation. Counsel for the United States admit that there are many other areas of the coast line which will at some time in the future require adjudication, but they wish to proceed with only the three areas selected by them at this time. In other words, they wish to litigate the location of the line of demarcation piece by piece—a procedure which obviously would take many years and would, in practical effect, necessitate a multiplicity of legal actions. To take the six or seven areas described in the State's letter to the Master of October 27, 1948, and adjudicate these areas in one proceeding will be a vast saving of the time of the Court, of counsel on both sides and of numerous witnesses.

We do not agree with counsel's statement (p. 7) that "the principles employed in determining the status of the three segments" will necessarily "facilitate the disposition of the problem with respect to the others." No two areas present identical situations. The status of each area must be determined on the basis of its own geographical facts, historical background and other relevant data. There is no general rule or criterion which can be established for all areas.

The statement is made by counsel for plaintiff in their Memorandum (p. 9) that

> "Large amounts of petroleum are meanwhile being extracted and drained from the three areas designated by the United States, . . ."

This does not correctly state the situation which exists. It is true that drilling operations to the extent originally authorized under State leases are proceeding in these areas, under a stipulation between the parties which requires that all royalties received by the State be impounded until it shall be determined whether the oil taken from under these leases comes from the area seaward of the low-water mark and outside of inland waters, or not. It is a matter of common knowledge that there is urgent need for the production of this oil for both military and civilian uses, and the highest officials of the United States have urged that this production be continued under the above mentioned stipulation.

Furthermore, this stipulation is a practical necessity and if it did not exist there is great probability that a large number of wells might be shut down, which would not only aggravate the oil shortage but might cause enormous and irreparable loss to all parties through the destruction of the wells. Under the terms of this stipulation this so-called drainage is not causing the United States any loss or damage. Indeed, it is well known that the royalties paid under State leases (and now impounded) are higher than those payable under any presently existing Federal law. And, rather than the alleged effect of operations under the existing Stipulation being to occasion loss or damage to the United States by drainage, the actual effect

is definitely to protect these interests,—to protect them from the drainage of oil beneath the areas in dispute by upland wells on private property which draw from and would deplete the same underground pools.

Furthermore, we desire respectfully to call the Court's attention to the fact that the general decree entered by the Court October 27, 1948, does not actually determine who has control or ownership of any existing oil well which is bottomed beneath the waters along the California coast. The decree, as it stands today, is nothing more than the pronouncement of a general principle which remains wholly inapplicable to any particular land and wholly unenforceable until the precise limits of the area to which this general principle is to be applied are accurately determined. The effect of this general decree, as above stated, places the titles to all lands fronting on the California coast and to all existing oil wells which are bottomed beneath the waters under a cloud and in a state of uncertainty which will not be removed until this line of demarcation is accurately determined.

It must be borne in mind that this area, known as the three-mile belt, which is the subject of the Court's decree, *is within the boundaries of California.* The officers and attorneys of the State therefore believe that the State, as a party to this case, has a right to have this line of demarcation delimiting that portion of the State's territory which is subject to a paramount Federal power from that portion which is not subject to this power fixed, and that the right to have this area defined is not limited to the three small segments which are now known to contain oil, but exists as to the entire area subject to the general decree. If this were not so, the result would be that *as*

to all areas where the line of demarcation is not fixed the Court's decree would amount to nothing more than an abstract or advisory opinion on a general principle, which is of course recognized not to be within the power of the Court to render.

V.

Evidence Is Necessary to Determine the "Appropriate Procedure."

There is a second phase of the Special Master's instructions from the Court; namely, the "appropriate procedure to be followed in determining the precise boundary of such segments." The method to be followed in fixing the seaward limit of the inland waters calls for full and careful consideration of a great many factors as to which the parties are not in agreement. The view of the premises and the testimony which the Master proposes to take will, in our opinion, be of great assistance, if not indispensable, to any recommendation which the Master may desire to make on this question.

We submit, therefore, that on both matters referred by the Court to the Master there is necessity for the taking of evidence, and that the Master should be allowed to exercise his judgment as to what evidence will assist him in making a recommendation which will be helpful to the Court.

We submit, further, that the very fact that there is a dispute between the parties as to which of the various areas call for adjudication first and with the greatest urgency, and that this dispute cannot be resolved by pretrial conferences, of itself demonstrates that evidence of the necessities is required.

Conclusion.

In conclusion, we submit that the Motion should be denied and the reference proceed in the orderly manner outlined by the Special Master for the performance of his duties and functions. There is no dispute as to that which is to be done,—the protest made goes to the careful and thorough manner in which it is proposed to be done. The Special Master desires to obtain first-hand information upon which to base his recommendations. He believes that without this they might not be of the desired helpfulness to this Court. We deem him fully qualified to follow the Court's order and carry out its reference. We do not share the views of counsel for the plaintiff, nor do we presume to state that the recommendation of the Special Master "may be appropriately made upon the basis of discussions with counsel and documents submitted by them."

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,

EVERETT W. MATTOON,
Assistant Attorney General,

600 State Building, Los Angeles 12,
Counsel for California.

December 14, 1948.

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CHARLES ELMORE CR
CL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. ~~12~~ 6 Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA

REPORT OF SPECIAL MASTER

New York, New York,
May 31, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 12, Original

UNITED STATES OF AMERICA,

vs. *Plaintiff,*

THE STATE OF CALIFORNIA

REPORT OF SPECIAL MASTER

By Order of the Court of February 12, 1949 appointing me Special Master, I was requested to make recommendations to the Court, with all convenient speed, as to what particular portions of the boundary call for precise determination and adjudication, and if I should conclude that such adjudication should be made, then I was also authorized to recommend to this Court an appropriate procedure to be followed in determining the precise boundary of such segments.

Coastal Segments Recommended

I recommend to the Court precise determination and adjudication of the following particular portions of the boundary:

Group 1

The three segments of the California coast specified in the Government's petition for supplemental decree (filed

January 29, 1948) (a) beginning at Point Conception and extending to Point Hueneme (Coast & Geodetic Survey Chart 5202); (b) San Pedro Bay (Chart 5147); and (c) the coast line from the southern extremity of San Pedro Bay to the western headland at the entrance to Newport Bay (Chart 5101).

Group 2

The four segments proposed by California (Trial Brief Before the Master, April 21, 1949; Exhibits 7, 10, 11 and 12) and identified as (a) Crescent City Bay (Chart 5895); (b) Monterey Bay (Chart 5402); (c) San Luis Obispo Bay (Chart 5386) and (d) Santa Monica Bay (Chart 5101).

Comment

As to Group 1 above, the parties are in agreement that these three particular portions of the boundary call for precise determination and adjudication at this time. The Government has contended, ever since the filing of its petition for a supplemental decree on January 29, 1948, that no other segments now require adjudication. California, agreeing that there is need for prompt determination of the boundaries of these three segments, petitioned (Answer to Petition for Entry of Supplemental Decree, filed February 24, 1948) for a prompt determination of the precise California coastal boundary all the way from Oregon to Mexico. California's petition was denied on June 21, 1948 (334 U. S. 855). Judge Groner, having been appointed Special Master, California submitted to him a list of 104 coastal segments requiring adjudication. (See Exhibit 1 of the Trial Brief submitted to me, dated April 21, 1949). On October 27, 1948, in a letter to Judge Groner, California selected from these 104 segments six segments as to which it asked immediate precise determination and adjudication. The four segments recommended for adjudication

in Group 2 above are four of these six segments. Two, Arcata-Humboldt Bay (Exhibit 8, Chart 5602) and Bodega-Tomales Bays (Exhibit 9, Chart 5502) have been omitted from my recommendation.

I have not been able to accept the Government's contention that only the boundaries of the three segments of Group 1 above should be determined and adjudicated at this time. It has seemed to me that a wiser and fairer procedure would be to make now an intelligent selection adequate to present in reasonably significant variety the principal questions that will have to be decided before particular boundary lines or locations can be precisely determined.

Precise determination of any portion of the boundary (whether an extended boundary line or the locus of a point, such as a particular oil well) is a surveying job in execution of a preliminary judgment fixing criteria. Final adjudication of the exact locus of a line or point, if or when such an exact adjudication might become necessary, would presumably be effected by the Court's confirmation of a directed survey and the entry of an appropriate decree (Cf. *New Jersey* v. *Delaware*, 295 U. S. 694; *Oklahoma* v. *Texas*, 261 U. S. 340). It may be, I suppose, that an adjudication of criteria of low-water mark, etc. may make any subsequent more exact determination unnecessary. In the instant situation I find that no such survey can be made until there has been judicial determination of three questions:

(a) By what criteria is "the ordinary low-water mark on the Coast of California" to be ascertained;

(b) Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn;

(c) What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland wa-

> ters, then by what criteria are the inland water limits of any such channel or other water area to be determined.

Each of the recommended segments will present a particular example of Question (a) above. The applicable criteria lend themselves, it would seem, to broadly inclusive generalization (Cf. *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10).

As to Question (b) above, whether a particular coastal indentation is in fact a bay or harbor constituting inland water will, I suppose, have to be adjudicated and fixed by decree of this Court for each case in which that question remains a matter of dispute. (Cf. *Oklahoma* v. *Texas,* 261 U. S. 340; 265 U. S. 500.) The segments listed in Group 2 above present that question in a variety of aspects and not, I think, in excessive number. It seems reasonable to suppose that the development and the application of criteria in the recommended areas might be expected to lead to generalizations applicable without too much difficulty to other areas. The determination of land-marks from which the lines marking the seaward limits of bays and harbors are to be drawn, is presented in considerable variety in the areas included in Group 1 and also in the areas included in Group 2. Because of this, I have not included Arcata-Humboldt Bays (Exhibit 8, Trial Brief of State of California of April 21, 1949) or Bodega-Tomales Bays (Exhibit 9) in my recommendations. As to them, the Solicitor General, in a letter to me of May 9, 1949, says:

> "In the case of Humboldt Bay, Bodega Harbor and Tomales Bay (the latter two areas being the significant portions of the Bodega and Tomales segments), the dispute would seem to be formal in character, awaiting only an agreement by the parties as to the status of the areas as inland waters."

Thus, in these two segments, as in the areas of San Francisco Bay and San Pedro Bay covered by the stipulation of

July 26, 1947 (Appendix C of Decree Proposed by the United States, etc., filed September 13, 1947), the only question in dispute is the exact location of the line marking the seaward limit of the bay or harbor. I see nothing to be gained by adding them now to the already-ample exemplifications of that problem. Here, too, the development and the application of criteria in the recommended areas should simplify the problem for other areas. It might well lead to subsequent agreement about, or at any rate to ready determination of, the boundary lines of these omitted bays.

As to Question (c) above, what is the status of particular channels and other water areas between the mainland and offshore islands and by what criteria the limits of inland waters in such areas are to be determined, is presented in Item (a) of Group 1, as that item is stated in the Government's petition for supplemental decree, and in further variety by the claim of California as to the extent of inland waters along that whole segment of the coast, from Point Arguello to Point Loma. (See Exhibit 13 of Trial Brief, dated April 21, 1949.)

Procedure Recommended

The duty imposed upon me by the Order of the Court precludes, for me, acceptance of the contention of California that the questions involved in the determination of these boundaries "are purely legislative in character" beyond the power of this Court (Cf. Opinion 4-5; 332 U. S. 19, 25-6). I proceed, therefore, to exercise the authority vested in me "to recommend to this Court an appropriate procedure to be followed in determining the precise boundary of such segments." I recommend:

That the Court appoint a master to take, with all convenient speed, such evidence as may be introduced as to the lines which in the said seven coastal segments divide the

areas underlying the Pacific Ocean described in Paragraph 1 of the Court decree of October 27, 1947 in which the United States is now, and has been at all times pertinent hereto, possessed of paramount rights and full dominion and power over the lands, minerals and other things and in which the State of California has no title or property interest from the areas lying landward of the ordinary low-water mark on the coast of California and within the inland waters of that State, and the proper mode of locating said lines, and report the same to the Court, but without findings or conclusions; the times and places of taking such testimony, and the order of taking the same, to be fixed by stipulation of the parties, and, if they shall fail to stipulate, to be fixed by the master; that the master be given discretion to direct the attorneys for the parties to appear before him for conference to consider, (1) a simplification of the issues; (2) the necessity or desirability of statements of the issues, and amendments thereto, in the nature of pleadings; (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (4) the limitation of the number of expert witnesses; and (5) such other matters as may aid in the disposition of the action, and to call for such evidence as he may deem necessary.

Many of the questions of ultimate fact and of law in these proceedings are, in my opinion, of such a nature that it would be inadvisable to entrust the master with the making of ultimate findings of fact or conclusions of law. If it should be the desire of the Court to have such findings or conclusions, then I would think it advisable not to impose the duty upon a master but to appoint a special court of federal judges.

It seems clear from the history of this case and from the statements submitted to me by the parties as to the kinds of evidence they expect to submit, that a great part, if not all, of the evidence can be submitted in documentary form

or in agreed or undisputed statements of fact as to physical and geographical factors and historical data. It is for this reason that I have recommended that the master be given specific authority to follow procedures analogous to the pre-trial procedures of Rule 16 of the Federal Rules of Civil Procedure. Otherwise, the recommended procedure follows the procedure adopted by this Court in *Oklahoma* v. *Texas*, 256 U. S. 602, 608-9 (Cf. 253 U. S. 465; 256 U. S. 70; 258 U. S. 574; 260 U. S. 606, 625; 261 U. S. 340; 265 U. S. 500).

Respectfully submitted,

WILLIAM H. DAVIS.

New York, New York, June 3, 1949.

UNITED STATES COAST AND GEODETIC SURVEY CHARTS OF THE COAST OF THE STATE OF CALIFORNIA

EXHIBIT A—Charts depicting the entire coastline of the State of California:

Chart No. 5052—The coastline from the Mexican border to San Francisco Bay.

Chart No. 5020—The coastline from San Francisco Bay to the Oregon line.

EXHIBIT B—Charts depicting the California coast specified in the Government's petition for supplemental decree:

Chart No. 5202—Beginning at Point Conception and extending to Point Hueneme.

Chart No. 5147—Detailed chart of San Pedro Bay.

Chart No. 5101—The coastline from the southern extremity of San Pedro Bay to the western headland at the entrance of Newport Bay.

EXHIBIT C—Charts depicting the four segments of the California coast proposed by California for immediate, precise determination and adjudication:

Chart No. 5895—Crescent City Bay.

Chart No. 5402—Monterey Bay.

Chart No. 5386—San Luis Obispo Bay.

Chart No. 5101—Santa Monica Bay. (See above under Exhibit B.)

EXHIBIT D—Charts depicting two segments of California coast proposed by California but rejected by the Special Master:

Chart No. 5602—Arcata-Humboldt Bay.

Chart No. 5502—Bodega-Tomales Bay.

MOTION FILED MAY 6 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. [redacted]6, Original

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

STATE OF CALIFORNIA

} ORIGINAL

PETITION

HAROLD L. ICKES,
Member of the Bar of the
Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 11, Original

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

STATE OF CALIFORNIA

} ORIGINAL

PETITION

Now comes Harold L. Ickes, a member of the Bar of the Supreme Court of the United States and asks leave of this Honorable Court to file a Suggestion, a copy of which is hereto attached and made a part hereof.

Respectfully submitted,

HAROLD L. ICKES,
Member of the Bar of the
Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 11, Original

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

STATE OF CALIFORNIA

} ORIGINAL

SUGGESTION

---

1. On June 23, 1947 (332 U. S. 19), this Court rendered its decision in the above entitled case in which it said, *inter alia:*

> "that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."

2. As of the date of July 26, 1947 a stipulation signed by Tom C. Clark, Attorney General of the United States, and Fred N. Howser, Attorney General of California, and "recommended" by J. A. Krug, Secretary of the Interior of the United States, was filed with your Honorable Court. This stipulation purported to exclude from the effect of

the opinion in the above-entitled cause certain specified areas lying along the shore line of the State of California.

3. As of the same date, a second stipulation signed by Tom C. Clark, Attorney General of the United States, Fred N. Howser, Attorney General of California, and "recommended" by J. A. Krug, Secretary of the Interior of the United States, was filed with your Honorable Court.

This stipulation purported to provide, in Paragraph 1 that:

> "all operations within or upon the tide and submerged lands lying along the coast of California, carried on under the terms of any lease issued by the State of California prior to June 23, 1947 and now in force, may continue without interruption."

This stipulation further purported to provide in Paragraph 3 thereof:

> "With the advance approval of the Secretary of the Interior, the state shall, during the period fixed by paragraph 9 of this stipulation, call for bids for, and, to the extent permissible under state law, enter into, new leases in cases where it is necessary to do so in order to prevent drainage of oil or gas from tide or submerged lands by wells drilled in other lands, or to protect the respective interests of the parties hereto. During such time, the state may require any of its lessees to drill new wells or approve their drilling for the purposes, described in this paragraph, provided that it gives the Secretary of the Interior notice of its action at least fifteen days before drilling is to commence."

And in Paragraph 9 thereof:

> "This stipulation shall remain in effect until pertinent legislation is enacted by the Congress; provided, however, that if no such legislation is enacted prior to July 31, 1948, this stipulation shall terminate as of

sixty days subsequent to that date, and the parties hereto shall meet within 30 days after July 31, 1948, to reconsider the terms of this stipulation and to determine whether this stipulation or a revision thereof should be continued for a further period * * *."

Also in Paragraph 10 that:

"This stipulation shall be deposited with the Clerk of the Court, with the request that it be brought to the attention of the Court at the opening of the October Term, 1947. Nothing herein shall be deemed in any way to abridge the power or jurisdiction of the Supreme Court with respect to the subject matter of this action."

4. On October 13, 1947, (332 U. S., 787), this Court denied a rehearing in the above-entitled cause, thereby affirming its decision of June 23, 1947.

5. As of October 27, 1947, this Honorable Court filed and entered its decree herein to the following effect:

"1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.

"2. The United States is entitled to the injunctive relief prayed for in the complaint."

6. Also under date of October 27, 1947, this Court entered the following order and decree, which appears in 332 U. S. 804:

"Since our opinion, which was announced in this case June 23, 1947, (332 U. S. 19) two stipulations (the

purport of both of which has been quoted hereinabove) have been filed in this Court, signed by the Attorney General and Secretary of the Interior of the United States on the one hand and by the Attorney General of the State of California on the other hand. In these stipulations the Attorney General and the Secretary of the Interior purport to renounce and disclaim for the United States Government paramount governmental power over certain particularly described submerged lands in the California coastal area. In such stipulations the United States Attorney General and Secretary of the Interior furthermore purport to bind the United States to agreements which purport to authorize State lessees of California coastal submerged lands to continue to occupy and exploit those lands, and which agreements also purport to authorize California under conditions set out to execute leases for other submerged coastal land. . . .

"It is further ordered that the stipulations between the United States Attorney General and the Secretary of the Interior on the one hand and the Attorney General of California on the other, which stipulations purport to bind the United States, be stricken as irrelevant to any issues now before us."

7. As of the date of July 28, 1948, a stipulation signed by Tom C. Clark, Attorney General of the United States and Fred N. Howser, Attorney General of California, and "recommended" by J. A. Krug, Secretary of the Interior of the United States, was filed.

This stipulation purported to provide that:

"1. The stipulation entered into by the parties to this cause on July 26, 1947, providing for a continuation of operations within or upon tide and submerged lands lying along the coast of California, be and the same is hereby extended and continued in effect until the expiration of sixty days subsequent to July 31, 1949. The provisions of this paragraph are not intended to preclude other arrangements adopted prior to July

31, 1949, by reason of an order of the Supreme Court or an Act of Congress."

8. As of the date of August 2, 1949, a further stipulation, by and between the same parties, was filed in the above entitled cause. This stipulation purported to provide that:

"1. The stipulation entered into by the parties to this cause on July 26, 1947, as extended by the stipulation of July 28, 1948, providing for a continuation of operations within or upon tide and submerged lands lying along the coast of California, be and the same is hereby extended and continued in effect until the expiration of sixty days subsequent to July 31, 1950. The provisions of this paragraph are not intended to preclude other arrangements adopted prior to July 31, 1950, by reason of an order of the Supreme Court or an Act of Congress."

And also that:

"2. The parties hereto shall meet within thirty days after July 31, 1950, to consider the said stipulation, as herein extended, and the effect thereon of any further proceedings or determinations in this cause, and to determine whether the said stipulation as extended, or a revision thereof, should be continued for a further period."

9. The stipulations of July 28, 1948 and August 2, 1949 merely attempted to extend for further stated periods the stipulation dated July 26, 1947, which said stipulation provided that, "with the advance approval of the Secretary of the Interior, the State shall, during the period fixed by paragraph 9 of this stipulation, call for bids for, and, to the extent permissible under state law, enter into, new leases in cases where it appeared to be necessary to do so in order to prevent drainage of oil or gas from tide or submerged lands by wells drilled in other lands, or to protect

the respective interests of the parties hereto. During such time, the State might require any of its lessees to drill new wells or approve their drilling for the purposes described in this paragraph, provided that it gave the Secretary of the Interior notice of its action at least 15 days before drilling was to commence."

The said stipulation further provided in paragraph 1 that "During the period fixed by paragraph 9 of this stipulation all operations within or upon the tide and submerged lands lying along the coast of California, carried on under the terms of any lease issued by the State of California prior to June 23, 1947 and now in force, may continue without interruption."

10. The stipulations hereinabove referred to provided that the State of California should "segregate and hold in a special fund all rentals, royalties, and other payments received from said lessees or under said leases * * *."

They further provided that:

> "* * * the monies segregated and held in the special fund * * * shall be distributed and paid over pursuant to the agreement of the parties, or in the absence of agreement pursuant to a final judicial order or decree. The above provisions of this paragraph are not intended to preclude any other proper disposition at an earlier time by reason of an order of the Supreme Court of the United States or of an Act of Congress."

11. On or about August 8, 1947, Mastin G. White, Solicitor of the Department of the Interior, addressed to the Secretary of the Interior a memorandum (M-34985) expressing the opinion that the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437; 30 U.S.C. 181, *et seq.*), did not authorize the issuance of oil and gas leases affecting the submerged lands below low tide off of the coasts of the United States and outside of the inland waters of

the States. Under date of August 29, 1947, the Attorney General stated in a letter to the Secretary of the Interior that he had reached the conclusion "that the Act imposed no * * * requirement that the procedures set forth in that Act (Mineral Leasing) be followed with regard to the property which the Supreme Court held in that case (United States v. California) to be that of the United States." These opinions, in effect held that the United States Government possessed no power to operate, or permit the drilling or operation of, wells within or upon said lands so as to make available the oil or gas therefrom for its own purposes. Their practical effect was that the United States should not permit the exploitation of such oil or gas by others under concessions or contracts.

12. It is suggested that, to the extent that the stipulations referred to, or any of them, purport to be an exercise of, or delegation of authority, to exercise paramount rights of the United States in and power over the three-mile marginal belt along the coast of California, they and each of them, are null and void in that:

(a) They attempted to do, indirectly, what both the Attorney General and the Secretary of the Interior had protested that the Government lacked the power to do directly, and

(b) If the Solicitor of Interior was correct in his opinion, which was adopted by the Secretary of the Interior and which had the concurrence of the Attorney General, that the Mineral Leasing Act did not apply to these lands, then no legal authority was vested in any Federal official to grant leases, and

(c) Even if the Mineral Leasing Act had been held by the Secretary of the Interior (and the Attorney General) to be applicable to the three-mile marginal belt along the coast of California, these two officials, nor either of them, had the right or legal authority to

attempt to delegate to the State of California, even with the consent of that State, the power to advertise for or grant leases, in the event of suspected or known drainage of oil or gas from the marginal belt, or otherwise.

13. It is suggested, on information and belief, that in advertising for bids for leases to offshore oil lands in which the United States holds paramount rights, the Lands Commission of the State of California, purporting to exercise power delegated under the stipulations hereinabove referred to, provided that a bidder should make a deposit of $25,000.00 with a condition of forfeiture in the event of non-performance. This forfeiture ran to the State of California and not to the United States of America despite the fact that this Honorable Court has held that the State of California did not own any of the offshore lands proposed to be leased. In effect, this was an attempt to strike down the opinion of this Honorable Court in the above-entitled case and cause it to be null and void.

14. It is suggested that, under the statutes of California, neither the State Lands Commission of that state, nor any other agency or official has the power to exercise any right with respect to any land to which the state itself has neither right, title nor legal interest. In this connection it should be noted (Paragraph 3 hereinabove) that the pretended power proposed to be granted to the State of California to grant new leases to its tide or submerged lands was only "to the extent permissible under state law."

15. It is suggested that the stipulations referred to are inconsistent with, and contrary to, the decision of this Honorable Court.

16. It is suggested, on information and belief, that the State Lands Commission of California has advertised for, and has agreed to enter into, leases with two oil companies

from whose adjoining lands there is alleged to be drainage of oil from offshore submerged lands, the paramount rights in and power over which are possessed by the Federal Government. This constitutes a grave trespass. The two companies whose bids for leases have been accepted are the Signal Oil Company and the Southwest Exploration Company, in the former of which the Standard Oil Company of California has a large, if not a controlling, interest. Moreover, the Signal Oil Company has stock control of the Southwest Exploration Company. It is further suggested that bids by companies of at least equal financial standing as the Signal Oil Company and the Southwest Exploration Company have been rejected, although these bids carried an offer of a royalty of some 50% in excess of the royalty proposed to be paid by the two companies mentioned.

17. It is suggested that, despite the order and decree of this Honorable Court entered under date of October 27, 1947, in the above-entitled cause, C. Girard Davidson, Assistant Secretary of Interior, sent a letter by air mail on October 19, 1949 to Rufus W. Putman of the State Lands Commission, Department of Finance, State of California, containing the following language:

> "Reference is made to your three letters all dated September 2, requesting the approval of this Department for the offering, and the leasing pursuant thereto for oil and gas development, one tract of tide and submerged coastal land (W.O. 296) in the Guadalupe area, San Luis Obispo and Santa Barbara Counties, California, and two tracts of submerged coastal land (W.O. 404 and W.O. 405) in the Huntington Beach area, Orange County, California.
>
> "The justifications for the leasing as stated in your requests are substantiated by the records of this Department. Accordingly, the offering and consequent leasing of the three tracts as proposed in your letters are hereby approved."

18. It is suggested that, not only the Attorney General and the Secretary of the Interior of the United States but the Attorney General of California, are proceeding without statutory or other authority, and contrary to the decision of this Honorable Court, and that all actions taken pursuant to the stipulations above referred to, or in reliance thereupon are illegal, null and void.

19. As a member of the Bar of this Court and therefore an officer thereof, your petitioner has appreciated the fact that the Court could not have knowledge of the information contained in this Suggestion. Moreover, the stipulation under date of August 2, 1949, purported to continue the original stipulation "until the expiration of 60 days subsequent to July 31, 1950," which fact, in view of antecedent circumstances, suggests the probability that, prior to said "expiration," a further purported extending stipulation will be entered into by the above-mentioned officers. Accordingly, your petitioner has felt it to be his duty to bring to the attention of the Court the foregoing facts so that the Court may, if it deems it appropriate, in order to protect its jurisdiction, enter an order calling upon the parties to the above-mentioned stipulations, and others who may be involved, to show cause why such stipulations should not be set aside as inconsistent with and contrary to the decision of the Court and the provisions of the decree promptly carried out.

Respectfully submitted,

HAROLD L. ICKES,
Member of the Bar of the
Supreme Court of the United States.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 6, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA

REPORT OF SPECIAL MASTER

(*Under Order of June 27, 1949*)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 11, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA

REPORT OF SPECIAL MASTER

(*Under Order of June 27, 1949*)

The Court, by its order of June 27, 1949, directed me to "proceed with all convenient speed, with respect to the seven coastal segments enumerated in Groups 1 and 2" of my report of May 31, 1949, to consider: "(1) a simplification of the issues; (2) statements of the issues and amendments thereto in the nature of pleadings; (3) the nature and form of evidence proposed to be submitted, including admission of facts and of documents which will avoid unnecessary proof; and report thereon to the Court".

The Issues

My report of May 31, 1949 (pp. 3-4) defined as follows the questions necessary to be determined by judgment of the Court before any survey could be undertaken:[1]

1. What is the status (inland waters or open sea) of particular channels and other water areas between the

[1] The questions are here stated in reverse order of their statement in the 1949 report. This reversal—proceeding here from the open sea toward the shore—will result in a more convenient statement of the issues and of the nature and form of the evidence proposed to be submitted.

mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn;

3. By what criteria is "the ordinary low-water mark on the Coast of California" to be ascertained.

These are the issues that need to be disposed of at this stage of the proceedings.

Before proceeding to summary statements of the positions of the parties, in the nature of pleadings, with respect to these three issues, I note, at the request of the parties, two points which they respectively insist upon but which lie outside of the directive in the Court's order of June 27, 1949.

First: California continues to oppose the determination by judicial decree of any of the boundary lines under consideration. It continues to contend that the questions involved in the determination of these boundaries "are purely legislative in character beyond the power of this Court". It does not suggest that it is within the Special Master's assignment to comment on this contention (Cf. Special Master's Report of May 31, 1949, p. 5); but it does ask that its continued insistence on the point be noted. Furthermore, California takes exception to the exclusion in my report of May 31, 1949, of the two segments, Arcata-Humbolt Bays and Bodega-Tomales Bays (Cf. report pp. 4-5).

Second: The United States throughout the proceedings leading up to the report of May 31, 1949, and throughout these proceedings under the order of June 27, 1949, has asserted, and California has not denied, that the three coastal segments comprising Group 1 are the only segments of offshore land along the California coast from which pe-

troleum is being taken. For that reason the United States insisted in the earlier proceedings, and it still insists, that only the three oil-producing segments comprising Group 1 call for adjudication at this time. But in the report of May 31, 1949, I recommended adjudication of seven segments in order that the questions involved in the determination of criteria for locating the base line of the marginal belt might be presented in a sufficient, but not in an excessive, variety of aspects (Cf. report of May 31, 1949, p. 4) and by the subsequent order of June 27, 1949 I was directed to proceed "with respect to the seven coastal segments enumerated in Groups 1 and 2".

It is clear, however, that no physical survey could be undertaken of any segment of the coastline, and no final decree could be entered, until after the above-stated criteria have been judicially determined and their concrete application to the seven segments of the coastline has been given consideration. Whether in any, or in which, of the seven segments an actual survey will then be required cannot now be predicted.

The Positions of the Contending Parties

The ultimate claims of the parties as to the location of the base line of the marginal belt at each one of the seven coastal segments are set forth, with reference to accompanying charts, in Appendix I.

The contentions of the parties as to the criteria to be applied in locating the base line will be stated, with reference to the three questions listed above, in what follows:

> *Question* 1. What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

Position of the United States

Each of the channel and other water areas between the mainland and offshore islands (referred to on Charts 5202 and 5101 as the Santa Barbara Channel, San Pedro Channel, Outer Santa Barbara Passage, and Gulf of Santa Catalina) consists of open sea and the three-mile marginal belt of the Pacific Ocean should be measured, in each instance, along the shore of the mainland opposite such channels ~~of~~ or other water areas. Each offshore island is enveloped by its own marginal belt (Vol. A/18-19).[2]

The position of the United States as to whether the waters within a strait are "territorial sea" or "high sea" is stated (A/19-20), but, because we are here concerned with the location of the base line of the marginal belt (territorial sea), rather than with any rule that assimilates "high sea" into the marginal belt, this portion of the statement is relegated to Note 1 at the end of this report.

California's Position

The base line of the marginal belt is a line, referred to as the "exterior" or political coastline, running outside of all ports, bays, harbors, and other bodies of inland waters and along the seaward side of the outermost off-lying rocks and islands (I/16).[3] The channels and passages embraced within these boundary lines are part of the State of California and of the territory of the United States. The seaward limits of such channels and other bodies of inland water (the base lines of the marginal belt) are to be de-

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[2] The binder marked "Volume A" transmitted with this report contains three communications from counsel for the United States: (1) "Memorandum of the United States In Response to The Request of Special Master of June 29, 1949", dated August 12, 1949; (2) Letter from the Solicitor General of August 19, 1949; and (3) Letter from the Solicitor General of February 13, 1950.

[3] See footnote, page ~~10~~ 11

termined by lines drawn from projecting points on the mainland and on outlying islands (I/20-21).

Even where the base line is drawn along a shore which confronts the open sea, California suggests that an important question will arise as to whether the marginal belt is to be measured from every conceivable point along the shore or only from straight lines drawn between salient points (I/17).

> *Question* 2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn?

Position of the United States

For indentations having pronounced headlands no more than ten nautical miles apart a straight line shall be drawn across the entrance; the envelope of all arcs of circles having a radius equal to one-fourth the length of the straight line shall then be drawn from all points around the shore of the indentation; if the area enclosed by a straight line across the entrance and the envelope of the arcs of the circles is greater than that of a semicircle with a diameter equal to one-half the length of the line across the entrance, the waters of the indentation shall be regarded as inland waters; if otherwise, the waters of the indentation shall be regarded as open sea.

Where the headlands are more than ten nautical miles apart, the line shall be drawn across the indentation through the point nearest the entrance at which the width does not exceed ten miles, and the same procedure shall be employed to determine the status of the waters inside that line (A/15).

The United States recognizes that allowances may have to be made for "existing agreements and 'historic' situa-

tions" but it contends that the burden of establishing such exceptions should be upon California (A/15).

Applying the formula proposed, the United States finds that none of the seven segments selected for adjudication presents a bay constituting inland waters. It recognizes, of course, that within the segments of coastline boundary to be determined, there are certain small bays and rivers entering the ocean, which constitute inland waters within the foregoing criteria.

It concedes that at least a part of San Pedro Bay is inland waters and that with respect to this segment (Group 1, Segment (b)), the only line to be located is that constituting the seaward limit of inland waters. It proposes (see Appendix I, p. 9) a line which cuts through the outer reach of the existing government breakwater. It maintains the propriety of that line notwithstanding that the American proposals at The Hague Conference upon which it relies for the delimitation of bays, estuaries and river mouths, provided with respect to ports that the outermost permanent harbor works shall be regarded as part of the coast in determining the base line of the marginal belt. It takes the position that if prior to the construction of these harbor works the seaward boundary of the inland waters of the bay were properly fixed at the line which the United States presently suggests, then the subsequent construction of the harbor works would not operate as a transfer of title to or dominion over the area embraced by the expanded harbor works, even though under The Hague proposals the extension might perhaps change the rights of the United States as against foreign countries (Transcript of Proceedings before the Special Master, p. 122).

As to *river mouths,* the United States maintains that when a river flows directly into the sea the waters of the river constitute inland waters up to a line following the general direction of the coast drawn across the mouth of the

river whatever its width. If the river flows into an estuary the rules applicable to bays apply to the estuary (A/18).

As to *landmarks,* its position is that where pronounced headlands exist at tributary waterways a straight line marking the seaward boundary of the tributary waters is to be drawn joining the outermost extensions of these natural headlands. Where the headland is not pronounced the terminus of the line should be the point of intersection of the ordinary low-water mark with a line bisecting the angle formed by a line coinciding with the general trend of the ordinary low-water mark along the open coast and a line coinciding with the general trend of the ordinary low-water mark along the shore of the tributary waterway (A/2).

California's Position

California states its position thus: "That is a bay which has been historically recognized as such, or which is authoritatively determined to be such", as illustrated in the decisions in the California Supreme Court in *People* v. *Stralla,* 14 Cal. 2d, 617, 96 Pac. 2d 941, and *Ocean Industries etc.* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722 (I/72); the determination must take account of physical and geographic factors, use and occupancy of the area, maritime trade routes, international practices and general national interests (Trial Brief of California, filed with Special Master, Apr. 21, 1949, p. 36 *et seq*). (Note: See letter of March 28, 1951, Mattoon to Special Master).

With respect to the line proposed by the United States at San Pedro Bay, California specifically objects to it on the ground that it "comes inside the San Pedro Breakwater. We know of no definition of a Port or Harbor which would permit the drawing of the seaward limit of such Port or Harbor inside of the outermost of the permanent harbor-works or installations" (I/57-58).

California also lists the following areas which it claims are inland waters because they are, it asserts, ports and harbors, as well as roadsteads:

Crescent City Port and Harbor
Ports and Harbors within Monterey Bay
San Luis Obispo Port and Harbor
Santa Barbara Port and Harbor
Ventura Port and Harbor
Ports and Harbors within Santa Monica Bay
Newport Beach Port and Harbor

(I/58).

As to *river-mouths* California has not objected to the rule proposed by the United States (ante p. 10).

As to *landmarks,* California's position is that where a bay is claimed as inland waters solely because it is a bay—for example Monterey Bay and San Luis Obispo Bay—the lines marking the seaward limits are to be drawn between the more prominent headlands which by their protrusion give the bay its character as such. If it becomes necessary to establish the seaward limit of any harbor the line should be drawn along the outermost of the permanent harbor-works or installations (I/19).

Nature and Form of the Evidence Proposed to Be Submitted on Questions 1 and 2

Neither party contends, or proposes to submit any evidence to prove, that the criteria it now advances for answering Question 1 or Question 2 above have heretofore been definitively adopted by the United States or established as customary rules of international law.

The *United States* recognizes that these two questions present problems which have international aspects and require consideration of documentary materials reflecting

developments in the field of international law, and that the problems presented may also call for reference to historical and geographical data pertinent to the coastal segments under consideration. But it regards these problems as *legal* issues to be determined by the Court without the necessity of any prior hearings or testimony before a commission or master, on reference to documentary records of occurrences in the field of international law, to official publications of the legislative and executive branches of our Government; to recognized historical documents and treatises, and to authoritative technical and scientific publications.

More specifically, the United States refers to the proposals as to geometric criteria for determining the status of straits between the mainland and offshore islands and for determining the seaward boundaries of the inland waters of bays, etc., made by the Delegation of the United States at the Conference for the Codification of International Law held at The Hague in March-April, 1930, under the auspices of the League of Nations.

It says that The Hague Conference of 1930 "did not, of course, result in any treaty or convention * * *. However, there was considerable unanimity * * * in respect to certain of the questions before the Conference and the views expressed at that time * * * constitute, in our opinion, valuable and pertinent indications of the extent to which the various concepts [were] discussed and developed at that time. Of particular importance, we think, are the proposals made by the Delegation of the United States at the Conference" (A/6-7).

In the event that the documents it proposes to refer to are not subject to judicial notice, the United States proposes to offer in evidence a limited number of charts and publications of which it has submitted a list to the Special Master (see A/23 and 24). It makes this offer, however, without

limitation of its right to refer to matters of common knowledge and documents or events of which the Court will take judicial notice, and with the reservation that "it might, in some instances, be necessary to introduce oral testimony for the purpose of demonstrating the applicability of the contents of a document to a particular situation" (A/23).

California takes the position that the base line of the marginal belt has never been determined or fixed by anybody in the United States; by either the legislative, the executive or the judicial departments of the government; that there is no law of the United States defining for general purposes the inland waters of the United States or fixing the base line for measuring the marginal belt; that there are no general rules of customary international law which answer the questions propounded and, in short, that "as a nation we are now free to fix that base line wherever we feel it ought to be fixed consistently with international practice"; and that the United States, in making the determination, is free to be guided by what it considers to be its best interests.[4]

The evidence California proposes to submit is offered to show that the criteria which it now advances are supported by wide international practice in other parts of the world, and that their adoption by the United States would violate no principle of international law and would be consistent with the positions taken by the United States in the past.

It takes note of the proposals made by the Delegates from the United States at The Hague Conference of 1930, but it opposes the geometrical criteria advanced in those proposals and does not suggest any geometrical substitute.

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[4] It is upon this asserted absence of any defined position of the United States and any established custom in international law that California bases its continued insistence that the questions involved in the determination of these boundaries "are purely legislative in character beyond the power of this Court".

It takes the position that the proposals which were not adopted by the Conference had no binding force and that there is no precedent either in law or practice or custom (national or international) for the employment of any geometric criteria such as or comparable with those proposed by the United States (I/70-71).

The material which California proposes to submit in support of its contentions is in the form of documents and oral testimony purporting to show "the history of each of the segments, its physiographical character, the activities carried on within its limits, and the legal considerations which lead to the placing of the limits of inland waters as distinguished from marginal seas" (I/29).

With the reservation that its summary cannot be complete without full knowledge of the principles and precedents upon which the United States intends to rely, California has, at my request, summarized the nature of its proposed oral testimony and has indicated what is intended to be proved by the many documents to which it proposes to refer. It has submitted, and I transmit with this report, two volumes, (I) "Summary of Testimony of Typical Witnesses" and (II) "Citation of Documents"[5], and a large number of official charts and maps.

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[5] In this report these two volumes are referred to as I and II, with arabic numerals indicating the pages.

Volume I contains the statement of California in response to the Special Master's letter of June 29, 1949, of August 12, 1949 (I/3-56); comments dated August 23, 1949 on a memorandum of the United States in response to the Special Master's letter of June 29, 1949 (I/57-83); and summaries of testimony of witnesses arranged under six subdivisions: Subdivision I—"Overall Unit Area of Inland Waters"; Subdivision II—San Pedro Bay and Long Beach Harbor; Subdivision III—Santa Monica Bay; Subdivision IV—San Luis Obispo Bay; Subdivision V—Monterey Bay; and Subdivision VI—Crescent City Bay. In Volume II, the citation of documents is accompanied by a statement as to what is intended to be proved by them. There are extracts of the pertinent portions of the text of the documents in the field of international law to which Judge Hudson plans to refer. This volume is arranged under the same six subdivisions as Volume I. The charts and maps are listed in Appendix 2.

California's Proposed Oral Testimony of Experts

Judge Manley O. Hudson:

To prove relevant occurrences in the field of international law, California offers the testimony of Judge Hudson to show that when the actual practice of States is examined they appear to have been guided by no uniform rules; that within only the most general limitations each State remains free to define its inland waters and to fix the base line of its marginal sea as its own interest may be deemed to require; that such wide variations are encountered in the practice of the various States that a State can adduce precedents for any action, within reason, which it may wish to take for the protection of its national interests (II/10).

More specifically (I/31-32) his proposed testimony is summarized as follows (I/34-35):

> "1) He will outline the present state of international law with regard to territorial waters and, particularly, with regard to the location of the baseline of the marginal belt, as such law has been developed in international treaties and in the practice and custom of nations.
>
> "(2) He will show how the failure of the nations to reach any agreement on the subject of territorial waters at The Hague Conference in 1930 has influenced the development of international law on this subject; also, how the diverse claims made by the various nations at The Hague Conference bears upon the present state of international law and practice with regard to territorial waters.
>
> "(3) He will cite and explain the statutes, decrees and diplomatic instruments of a number of coastal nations, showing how these statutes, decrees and instruments deal with the delimitation of inland waters and the establishment of the base-line of the marginal sea. * * *".

There is in Volume I a further summary of Judge Hudson's proposed testimony as to when the waters of a bay are to be regarded as inland waters (I/125-132) and as to the status of water areas between the mainland and offshore islands (I/133-138).

It is said that he "is prepared to show that a great number of states place the baseline of the marginal sea along the outer edge of the most outlying islands, islets, rocks and reefs along their coast, without regard to the distance by which they are separated from the mainland coast" (I/134) and that in his proposed testimony he will "relate the results of his exposition of practices in other parts of the world to each of the segments of the coast of California presently under examination and thus show what might properly be the position taken by the United States with respect to the fixation of a boundary line between inland waters and open sea" (I/129).

The chosen extracts from the text of each one of the documents proposed to be submitted in connection with the testimony of Judge Hudson [6] have been examined with care. The documents (statutes, decrees and diplomatic instruments) appear, without exception, to relate to occurrences in the field of international law of a character to which reference could and would be made by court or counsel engaged in research in that field (*The Paquette Habana*, 175 U. S. 677; *Jones* v. *U. S.*, 137 U. S. 202; *People* v. *Stralla*, 14 Cal. 2d 617; 96 Pac. 2d 941). There is no suggestion of

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[6] At pages 12-58 of Volume II, some 169 documents are listed under the subjects: A. Islands (12-25); B. Bays, subdivided into "I. Claims to all bays, without regard to dimensions" (26-30); "II. Claims to particular bays of Great Dimensions" (31-39); and "III. Claims to Bays of Limited Dimensions but Wider Than 10 Miles" (40-46); C. Ports and Harbors, subdivided into "I. Ports, Entrances to Ports, Roadsteads and Harbors Included in Inland Waters" (47-52); and "II. Claims to Particular Ports and Harbors" (53); D. Salient Points (54-55); E. Banks (56-57); F. Wharves (58).

any factual controversy about the contents of any one of the documents, such as would require resort to evidence drawn from the background of, or from contemporary construction of, the particular document. In short, the authenticity of the individual documents is not to rest on the testimony of the witness as to controverted facts; rather the proposed testimony of Judge Hudson is to rest for its authenticity upon the documents and upon his experience in the field of international law.

After examining the documents I am convinced that a commentary by Judge Hudson upon them, including, among other things, a statement of his views as to the significance of the several documents with reference to California's contentions, would be enlightening and helpful. Such comment might be presented to the Court in a brief, as was done in the main brief in this case, or by an additional memorandum as Professor Hyde and Dean Pound did in the *Texas* case. California, however, very greatly prefers, and strenuously insists, that what Judge Hudson has to say should be said in the form of sworn testimony.

Dr. John W. Caughey:

It is proposed that Dr. Caughey, Professor of History, University of California at Los Angeles, 1930-1949, "will present historical data as to the discovery of each of the bodies of water in question, with particular reference to the manner in which those areas were treated, that is as to whether they were to be considered inland waters or open ocean. He will describe the use and development of these areas from the historic times down to the time when official United States records commenced to be made and will present such historical facts as bear on the question whether these areas are inland waters by reason of having been recognized historically as such" (I/40-41).

In the summary of Volume I, his proposed testimony with respect to the overall unit of inland waters is set forth in some detail (I/178-185) and, with reference to whether particular segments are in fact bays or harbors constituting inland waters, his proposed testimony is outlined separately as to Crescent City Bay, Monterey Bay, San Luis Obispo Bay, Santa Monica Bay, and San Pedro Bay (I/160-177).

The nature of the historical facts which California proposes to prove by this witness is summarized as, "* * * the historical facts that suggest that the waters between the southern California mainland and its islands are protected, inland waters rather than open sea":

> "1) The boating, fishing Indians here at the time of the coming of the white man used these waters constantly, shuttling back and forth to the islands.
>
> "2) Early navigators, from Cabrillo to Vancouver, certified that the channel provided a safe passage and that, in the various anchorages afforded, ships could find shelter from any storm.
>
> "3) The sea-otter hunters and traders and the hide traders worked this entire region in all kinds of weather. They landed and loaded at dozens of anchorages. In their day this represented almost the total commerce of southern California.
>
> "4) For many years after the United States took over, southern California was heavily dependent on sea routes, especially to San Francisco. As improvements were made at San Pedro, traffic increasingly centered there, but ships continued to stop at many places along the coast south of Point Conception.
>
> "5) The low ratio of wrecks south of Point Conception to those north of that point is further evidence of the protected character of the waters inside the chain of islands." (I/184-5).

Dr. Caughey's proposed historical summary is centered upon the asserted fact that historically the waters in ques-

tion have been recognized to be and have been used as sheltered waters. Thus (II/327-332) some forty-odd historical documents are listed which Dr. Caughey would refer to in commenting upon the original discovery of the waters in question, their appearance in subsequent exploration and their increasing occupation and use for maritime commerce up to the present time. Again, some nineteen documents are listed as reciting the use of the waters in question by the Indians, as observed by early settlers, for regular intercourse in commerce between islands and mainland, together with reports by early navigators of sheltered anchorages at many places within the area and references to the good and safe passage between the islands and the mainland (II/333-337). To show the asserted use of the area in the hide trade which was a principal business along the coast, eleven documents are listed (II/338-9). And to support the proposed oral testimony of the witness, "that the accident record for the California coast contains at least a suggestion on the protected character of the waters of Southern California", four documents are referred to (II/340-341). With particular reference to San Pedro Bay and Long Beach Harbor, fourteen documents are listed (II/431-433); fifteen are listed in connection with Santa Monica Bay (II/485-487); eighty-four in connection with the history of Monterey Bay (II/527-543) and twenty-four in connection with the history of Crescent City Bay (II/579-584).

Extracts of these documents have not been submitted by California, but the statements of what they are intended to prove illustrate their nature. They appear to be generally available historical documents and treatises such as courts are accustomed to take judicial notice of (see *The Antelope*, 10 Wheat. 66, 130; *Hoyt* v. *Russell*, 117 U.S. 401, 405). A commentary from Dr. Caughey pointing out the

significance of these documents to the central question of the sheltered character of these waters and their use as such would certainly be enlightening and useful. Here, as in the case of the proposed commentary by Judge Hudson, it could be presented as historical commentary by recognized authority, with or without the support of an oath and with or without opportunity for cross-examination. California earnestly insists that it should be permitted to submit the material with the support of oral testimony.

Gerald C. Fitzgerald:

Mr. Fitzgerald, a civil engineer of wide experience in California (I/88), "as an expert, will describe the physical and geographical features of the segments as related to problems of navigation, harbor use, and shoreline development and with reference to wind and wave conditions * * *. He will also present facts as to the nature and extent of the improvements in the segments and the nature and extent of the use of these segments and the facilities therein, with the volume and value of traffic * * *. On the basis of his expert knowledge and experience he will give opinion testimony as to the character of the bodies of water involved" (I/36-38).

His proposed testimony is summarized by California as follows (I/121-122):

> "The sheltered waters existing between the mainland and the Channel Islands from Point Conception on the northwest, to Point Loma at the entrance to San Diego Bay, have a length of about 200 nautical miles, an average width of about 26 miles and an area of about 10,500 square miles.
>
> "These offshore islands, rocks, reefs, shoals, ledges and banks lie to the southward and parallel to the mainland blocking the force of the heavy westerly swell of the Pacific and affording a lee in winter from the full force of southerly swell and weather.

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>
> "These offshore islands, rocks, reefs, shoals, ledges and banks lie to the southward and parallel to the mainland blocking the force of the heavy westerly swell of the Pacific and affording a lee in winter from the full force of southerly swell and weather.

"A very considerable protection from oceanic waves from various directions is provided. There is a striking diminution in wave energy as one travels from the open sea west or north of Point Conception into the relative calm inland waters of Santa Barbara Channel. The amount of protection provided by these islands is augmented by wave refraction along their shoal shores.

"The steamer track lines between San Francisco, Los Angeles-Long Beach and San Diego Harbors, recommended by the United States Coast Pilot, lie within the over-all unit area, passing through Santa Barbara Channel, San Pedro Channel and the Gulf of Santa Catalina. The passage is free of dangers, has a deep channel and from the viewpoint of navigation is comparatively well sheltered.

"This overall unit area and the offshore islands have immense potential value for harbor development, shipping and National Defense.

"The physical and geographical characteristics of the over-all unit area and its use and occupancy are of such a nature as to establish its status as inland water."

Mr. Fitzgerald will, it is proposed, "present the results of his experience and expert research combined with factual and documentary evidence in a correlated manner" (I/105). The substance of this proposed testimony is presented in some detail (I/108-123).

As to whether the particular segments in question are in fact bays constituting inland waters, Mr. Fitzgerald's proposed testimony will be that of "an expert in problems relating to navigation and harbor use and shoreline development. He will present factual data which are the result of his own observations and documentary testimony in the form of hydrographic charts, topographic maps, official reports of federal and other governing bodies relating to the characteristics, improvement, maintenance, and oper-

ation of the harbors and their facilities. He will correlate all this factual data with observations based upon his wide experience in this field and demonstrate the status of these waters by reason of physical and geographical characteristics and from the viewpoint of use and occupancy" (I/89). The substance of his proposed testimony is recited in detail with reference to each of the several segments involved (I/89-107).

In Vol. II, Citation of Documents, there are listed some 40 charts and maps and 8 official reports intended to be used in connection with the testimony of Mr. Fitzgerald to prove "that this overall unit area and the offshore islands have immense potential value for harbor development, shipping and National Defense" (II/6-9). Under subdivision II, San Pedro Bay and Long Beach Harbor, there are listed 12 charts and maps and 11 official publications to which Mr. Fitzgerald will refer to support his testimony that "the waters of San Pedro Bay are comparatively well sheltered and the bay and channels of the harbors are navigable throughout the year" and that "the physical characteristics of San Pedro Bay and its use and occupancy are of such a nature as to establish its status as inland waters" (II/418-420). For like purpose 11 charts and maps and 11 official publications are listed with reference to Santa Monica Bay (II/471-3); 7 charts and maps and 11 official publications with reference to San Luis Obispo Bay (II/497-8); 9 charts and maps and 9 official publications with reference to Monterey Bay (II/515-516); and 7 charts and maps and 7 official publications with reference to Crescent City Bay (II/566-7).

Mr. Fitzgerald's proposed opinion testimony from the point of view of the physical and geographical features of the various segments of the coast, centers upon (1) use and occupancy, their extent and potentialities and (2) the causes and extent of sheltering. The documents to which

he intends to refer are official government publications immediately available for general reference. There is nothing to suggest that the scientific facts involved would be subject to dispute, or, if disputed, that they would not be capable of immediate and accurate ascertainment by resort to authoritative scientific treatises.

The other testimony proposed to be submitted by California is supplementary to Dr. Caughey's proposed historical summary or to Mr. Fitzgerald's proposed testimony as to use and occupancy and sheltering. This includes the proposed expert testimony of Dr. Grant, Dr. Shepard and Mr. Putnam, and the proposed testimony of factual witnesses.

U.S. Grant IV:

The testimony of Dr. Grant, who is a Professor of Geology (I/139), is proposed by California to supplement the testimony of Mr. Fitzgerald but with "special emphasis on the geological history and character of the areas in question as it relates to the configuration and exposure of these areas to the elements and as affecting their use by commerce and navigation" (I/38-9).

As to the overall-unit area of inland waters, it is proposed that Dr. Grant will describe the geological history of the physical features and evaluate present-day geologic and oceanographic factors as related to their effects upon the waters between the islands and the mainland (I/150). The summary submitted includes a detailed statement of the substance of his proposed testimony (I/150-156) and reference is made to "joint studies made by Dr. Grant and the Scripps Institute of Oceanography" which he will discuss.

As to bays, etc., his proposed testimony will explain the geological background and history, and will describe the source, extent, and characteristics of wave action within

the areas under consideration (I/140). The summary includes specific reference to the individual bays in the several coastal segments under consideration (I/140-149).

In the Citation of Documents, California lists 13 official and technical publications relating to oceanography, to be referred to by Dr. Grant to show that the forecasting of wave conditions and the evaluating of the protecting effect of headlands, reefs, islands, shoals, submarine valleys, etc., is a recognized branch of engineering science and that the methods used by the witness and by Dr. Shepard are recognized and approved methods in oceanography (II/315-316). With reference to some 57 charts and by joint studies made by Dr. Grant and the Scripps Institute of Oceanography, the effectiveness of the offshore islands and reefs to shelter the bodies of water in question will be shown (II/317-321). Using 6 listed charts for illustration, it is proposed to show "that in many locations along the coast of California indentations which were formerly open to the sea have become almost completely, if not entirely, closed off by sand spits extending from one headland to another", thus creating bodies of land-locked water (II/322-323). By reference to 7 charts "and by the witness' possessing personal knowledge and experience", it is proposed to show the difference between the coastline of California and the Atlantic coastline of the United States, showing that, because of the subsidence of the Atlantic Coast, protection of coastal waters by outlying islands is common, whereas on the California coast, because there the shoreline has been produced in large part by elevation of the land with respect to the sea, land-locked bays are exceptional (II/324-326). With particular reference to San Pedro Bay, 3 charts are listed for use in conjunction with Dr. Grant's proposed testimony (II/430); 9 charts are listed in specific relation to his proposed testimony about

Santa Monica Bay (II/483-4); 5 charts are listed with reference to San Luis Obispo Bay (507); 6 charts are listed with reference to Monterey Bay (525-526); and 4 charts are listed with reference to Crescent City Bay (578).

Dr. F. P. Shepard:

California proposes to submit the oral testimony of Dr. Shepard, Professor of Submarine Geology, Scripps Institute of Oceanography (I/186) as an expert in submarine geology to testify "in regard to each of the areas in question as to the sources of wave action, height, intensity and frequency; also, as to the effect of topography, configuration and hydrography on reduction of wave action (wave refractions) and as to the combined effect of wave refractions and exposures in affording protection" (I/39). He will, California says, "make use of published charts, maps and reports included in Exhibit 5 [I/47-56] and also will present the results of his own investigations and research" (I/39-40). As proposed, "the scope of his testimony relates largely to wave refraction which involves the determination in a scientific manner of the effect of shoals, islands, promontories and other physical features upon the direction, height, intensity, and frequency of waves" (I/187). The outline of his proposed testimony is particularized with reference to the several segments of the coastline here under consideration, and with reference to the overall unit area of waters between the mainland and the outlying islands (I/187-198).

By Dr. Shepard's commentary on 13 listed publications it is proposed to prove "that the forecasting of wave conditions in any selected area is a recognized branch of engineering science and that the methods used by the witness in evaluating the protecting effects of headlands, reefs, islands, shoals, submarine valleys and other obstacles to

the uninterrupted passage and undiminished effect of wave currents have their basis within the precepts of this science," and in this connection he will discuss wave refractions (II/342-345). With the aid of some 55 charts, it is proposed that he will illustrate "physical features which contribute to the comparatively high degree of protection afforded vessels navigating the overall unit of inland waters" and these charts will be used "in conjunction with the testimony of the witness relating to the wave refraction studies for this area made by the Scripps Institute of Oceanography under his direction" (II/354-5). As with the other proposed witnesses, particular charts are listed in connection with the several individual segments of the coastline under consideration (II/469A, 495A, 564A, and 589).

This proposed expert testimony of Dr. Grant and Dr. Shepard centers on the physical causes of the sheltering of the waters under consideration and its effect upon their use by commerce and navigation. It is offered by way of corroboration—showing the reason why—of the proposed testimony of Mr. Fitzgerald. It approaches the subject from the point of view of explaining the natural laws that bring about the observed results. The documents proposed to be referred to are official and technical publications in the field of oceanography and official government charts. It is said that these two expert witnesses are prepared to give fact testimony about wave refraction studies confirmatory of their opinions, made by the Scripps Institute of Oceanography and in which they participated.

Rufus W. Putnam:

With reference to some 80 government charts, it is proposed that Mr. Putnam, a retired Army engineer now Executive Officer, California State Lands Commission

(I/199), will apply to specific locations along the coast of California his opinion testimony to the effect that the interest of national defense "will be violated if any line of demarcation between the open seas and inland waters is fixed shoreward of the seaward side of the outermost offlying rocks and islands, or of lines connecting the outermost projections of headlands" (II/356-360) and "that the physical characteristics of the channels, roadsteads, anchorages, foreshore, banks, headlands, islands, reefs, and other features affect favorably the ease and safety of transit, mooring and other use by vessels navigating the over-all unit of inland waters so as to permit the use of smaller craft of lighter construction." (II/361-364).

The new point in this proposed testimony, beyond use and occupancy and sheltering, is Mr. Putnam's opinion as to how the interest of national defense would be affected if the base line of the marginal belt is not drawn around the seaward side of the outermost offlying rocks and islands, as California proposes.

Proposed Oral Testimony of Fact Witnesses

Owen O'Neill, County Surveyor of Santa Barbara County from 1915 to 1946, is proposed as a witness "on the Historical, Physical, and Use and Occupancy aspects of the Santa Barbara Channel in substantiating that it is a body of inland waters". Two government publications; a number of government charts; and four chapters of the statutes of California are listed as documents to which Mr. O'Neill would refer (I/210-13; II/394-6).

Capt. W. H. Leisk, " • • • has had intimate knowledge of and experience in the waters along the coast of Southern California from Point Conception to Point Loma for many years" and is proposed as a witness on "the physical characteristics of the waters in this area and their proper

classification" (I/214-220; II/397-399). The factors about which he will testify are summarized (I/218-220) as (1) protection afforded by the islands to vessel from weather conditions outside of these waters; (2) a comparison of these waters with other waters such as "the waters at the entrance to Long Island Sound, those around Martha's Vineyard, and those around Rock Island which is at times exposed to the North Atlantic storms, and which are classified as 'inland waters' " (I/216), and other similar waters; (3) the fact that the "outlying islands which enclose these waters have always been a constituent part of the State of California"; (4) inland waters have always been considered from a navigational standpoint as less hazardous than international waters which can be established in this case because of the protective barrier which is formed by the outlying islands; (5) the fact that insurance rates on craft which ply the waters from Point Loma to Point Conception landward of the outlying islands are less than on craft which ply outside waters; (6) there are a substantial number of vessels which can and do safely navigate the waters inside this chain of offshore islands which, while suitable for these waters, would not be suitable for navigation north of Point Conception. It is proposed that he will testify "that the waters of this area are not to be designated or classified as international waters but they are to be definitely recognized and established as constituting 'inland waters'."

To the same effect, from their various experiences, the factual testimony of the following witnesses is proposed: E. A. Judd, President of the Pacific Towboat and Salvage Company (I/222-226; II/400); Richard R. Loynes, engaged in the Marine Engine and other business in Long Beach (I/227-229; II/401); Arvin O. Leavitt, Superintendent of the Long Beach Boat Yard (I/231-233; II/402); G. P. Ellington, Port Captain for the Van Camps Sea Food Com-

pany (I/234-236; II/403); William Collins, Station Master for the Pacific Tow Boat and Salvage Company (I/237-241; II/404); J. A. Jacobson, Pilot and Marine Surveyor (I/242-244; II/405); Charles Hopton, who maintains "the largest boat landing in Long Beach" (I/245-247; II/406); Jeff Hoag, an employee of the Pacific Tow Boat and Salvage Company, etc., an officer in the United States Coast Guard Station at San Pedro (I/248-251; II/407); Lawrence W. McDowell, Past Commander of the Pilot Squadron of the United States, Long Beach Division, and presently Commodore of the United States Power Squadron for the Thirteenth District, etc. (I/252-255; II/408); John J. Turner, Vice President of the Pacific Tow Boat Salvage Company, etc., formerly Chief in the United States Coast Guard (I/256-269; II/409); Joseph Fellows, Jr., President of Fellows and Stewart Shipyard at San Pedro (I/260-261; II/410); D. M. Callis, a Naval Architect with offices in Wilmington, Long Beach and Seal Beach, California (I/262-264; II/411); L. J. Wesseth, the Warden and Captain of the Bureau of Patrol and Law Enforcement of the Division of Fish and Game of the State of California (I/265-266; II/412); Fred E. Barnett, Master of the California State Fisheries Vessel N. B. Scofield (I/267-269; II/413); Paul D. Petrich, presently employed by the California Division of Fish and Game as Ship Master (I/270-273; II/414); R. L. Patterson, presently consultant engineer for the Orange County Harbor Department, the governing body of Newport Harbor (I/274-276; II/415); Schuyler Coffin, amateur yachtsman (I/277-278; II/416).

The testimony of E. C. Earle, a Harbor Engineer, and Charles A. Hale, a Civil Engineer, both formerly with the Harbor Department of the City of Los Angeles, is proposed on the physical aspects of the portion of the "unit area" consisting of San Pedro Bay, San Pedro Channel, Gulf of

Catalina and Outer Santa Barbara Channel, to support the position of California that this body of water "is inland water and that San Pedro Bay and Los Angeles Harbor are, respectively, a bay and harbor and therefore inland waters also" (I/290-311; II/437-454). A large number of government charts and publications and some California statutes are listed for reference (I/307-311; II/437-454).

The testimony of R. R. Shoemaker, Chief Harbor Engineer, and of Eloi J. Amar, Port Manager, of the Long Beach Board of Harbor Commissioners, is proposed on the "Use and Occupancy Aspect of San Pedro Bay, a historic bay and body of inland waters", with reference to many documents (I/313-320 and 322-325; II/455-467-9).

George Ross, Chairman of the Natural Resources Committee of the Chamber of Commerce of San Luis Obispo, is proposed as a witness "to testify from personal knowledge and data in his possession as to the Use and Occupancy of San Luis Obispo Bay, between the headlands of Pt. San Luis and Pt. Sal", making reference to statutes of California and records of San Luis Obispo County (I/352-3; II/512).

W. T. Masengill, retired Manager of the San Luis Transportation Company, is proposed as a witness to testify from his own knowledge and with records in his possession on the historical aspects and physical characteristics of San Luis Obispo Bay (I/354-5; II/513).

As to Monterey Bay, the proposed testimony is that of Clyde A. Dorsey, City Manager of the City of Monterey as to the physical characteristics of the bay and the Harbor development at the Port of Monterey, with reference to statutes of California and records of the City of Monterey (I/371; II/544); of Arnold M. Baldwin, County Surveyor of Santa Cruz County as to physical characteristics including shelter, with reference to statutes of California, Coast & Geodetic Survey charts and early histories (I/372;

II/545); of Leon Rowland, a "twenty year resident of the Santa Cruz area, and newspaper man", from his historical knowledge of this section of the Bay of Monterey, with reference to the "Annals of Santa Cruz" (I/373-4; II/546); of Peter J. Ferrante, attorney for the fishing industry at Monterey on use and occupancy of the bay by the fishing industry, with reference to official records (I/375; II/547); of Alexander D. Russell, City Engineer of Santa Cruz as to use and occupancy with reference to documents (I/376; II/548); of Robert Blohm, President of the Board of the Moss Landing Harbor District, located at the mouth of the Salinas River, with reference to statutes of California, records of the County of Monterey and government reports and charts (I/377-8; II/549); and of Mary L. Greene, Curator of the Custom House, a State Historical Monument at Monterey, on the historical aspects of the Bay of Monterey, from personal research and from historical documents under her care (I/379-383; II/550-564).

With particular reference to Crescent City Bay, testimony is proposed of Joseph A. Miller, from "his long, local association with affairs relating to the port of Crescent City", with reference to the "log of the Crescent City lighthouse"—1857-1900 (I/393-4; II/585); of Lyle Prickett, member of the Board of Harbor Commissioners of Crescent City "from the viewpoint of a local resident interested in and officially engaged in the development and operation of the harbor", with reference to government publications and charts (I/395-6; II/586-7); and of Charles T. Thunen, a member of the City Council of Crescent City as to use and occupancy and harbor development, with reference to government publications (I/397-9; II/588).

All of this proposed expert and factual testimony of Mr. Fitzgerald and the other supplementary witnesses, going beyond the proposed commentaries of Judge Hudson of oc-

currences in the field of international law and Dr. Caughey in the field of history, to deal with physical, geographical and oceanographical features and the resulting sheltered characteristics of the waters in question, is opposed by the United States on the grounds (1) that these facts are irrelevant; that they have no bearing on what are "inland waters" within the meaning of the decision and the decree of the Court, and (2) that the facts involved are "primarily the physical and geographical actualities" existing along each segment of the coast, "about which there should not be any dispute" since they "are facts which are known or available to everyone and which neither party hereto can deny; they are facts which do not call for formal proof. Moreover, such facts appear in readily available published documents which can conveniently be brought to the attention of the Court" (A/41 *et seq*). California, on the other hand, vigorously insists on the propriety and desirability of this oral testimony.

Question 3. By what criteria is the "ordinary low water mark on the Coast of California" to be ascertained?

United States:

Ordinary Low Water Mark:

The United States interprets "ordinary low water" as the mean of all low waters, to be established by the United States Coast & Geodetic Survey from observations made over a period of 18.6 years, and it suggests a period between 1924 and 1942. The "ordinary low water *mark*" is, it maintains, the intersection of this plane of the mean of all low waters with the shoreline.

Artificial Accretions:[7]

The United States notes that it is not presently known whether any issue will be presented in connection with any of the segments to be adjudicated that will involve the location of the "ordinary low water mark" along parts of the coast where there have been artificial changes in the shoreline. However, it gives notice that if any such issue should arise, it will contend that where artificial changes have occurred in the shoreline since 1850, the low-water mark should be determined as of the date when the change was effected. Where artificial structures have brought about additions to the shoreline by accretion, the boundary must be determined, it says, after the Court has decided whether the California rule that accretions artificially induced do not accrue to the owner of adjoining land (*Carpenter* v. *City of Santa Monica,* 63 Cal. App. 2d, 772, 787, 794; 117 Pac. 2d 964, 972-975) or the Federal rule that such accretions do accrue to the owner of adjoining land (*County of St. Clair* v. *Lovingston,* 23 Wall. 46, 66-69) is to be applied.

The *United States* suggests that in the absence of any showing that this issue is necessarily involved in the adjudication of the seven segments now under consideration, there should not be a present adjudication of it.

California:

Ordinary Low Water Mark:

California approves the technical procedures established by the United States Coast & Geodetic survey,[8] but

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[7] The parties agree that gradual natural accretions and relictions should be ignored.

[8] With, however, the express reservation that it "cannot agree in advance to accept a survey by engineers of the opposing party to the litigation without opportunity for cross-examination or for having the survey

it interprets "ordinary low water" as the mean of all the *lower* low waters, rather than the mean of all the low waters.[9]

Artificial Accretions:

Where artificial changes have occurred in the shoreline since 1850, California takes the position that the resultant land areas are excluded from the "lands • • • underlying the Pacific Ocean" referred to in the opinion and in the decree of the Court. Where accretions have added to the shoreline from the presence of artificial structures, California takes the position that the Federal rule should be applied in preference to the California rule.

Thus, the primary issue on Question 3 is whether the mean of *all* low waters, as contended by the United States, or the mean of *lower* low waters, as contended by California, is to be chosen.

The subordinate issue of the effect of artificial changes (which the United States thinks need not now be determined) presents the two questions, (1) Should the low water mark be determined, with respect to artificial changes, as of the date when the change was effected or as of the present date and (2) Where artificial changes have caused accretions to the shoreline, should the California or the Federal rule be applied?

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checked by our own engineers." Presumably the United States would make the same reservation. This reservation does not, however, affect the substance of this report since the duty imposed at this time on the Special Master is only to deal with criteria for making such a survey. Any items of fact embraced within such a reservation could come into question only after the survey had been made in execution of a preliminary judgment fixing criteria.

[9] "There are two low tides daily on the California shore, the 'lower low tide' and the 'higher low tide.' In many places there is a substantial difference between the average of the lower low tides and the average of all the low tides. The former will be further seaward than the latter." (I/60)

Nature and Form of the Evidence Proposed to be Submitted

United States rests its case on a question of law, regarding the facts as not open to dispute. It refers to *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 26-27, as a holding by this Court that under the common law "the ordinary high water mark" meant a mean of all the high tides, and argues by analogy that "the ordinary low water mark" as used by this Court in the instant case signifies a mean of all low tides.

California concedes that in the *Borax* case "ordinary high water mark" was taken to mean the average of all the high tides, but it controverts the deduction of the United States that for the purposes of the present case "ordinary low-water mark is to be defined as the average of all the low tides."

As to the facts, California offers the oral testimony of J. Stuart Watson (I/205-208) to the effect,

> "that all authorities including the U. S. Coast & Geodetic Survey who predict tides for the Pacific Coast and publish navigation charts, the Corps of Engineers, who make Hydrographic Surveys and build Harbor Works and other agencies utilize the *Mean* of the *Lower Low Waters* as the datum for their work. He will show that this *Mean* of the *Lower Low Waters* datum is the most practical datum to use on the Pacific Coast as distinct from the Atlantic Coast for determination of the 'ordinary low-water mark' ".

and it lists for reference (I/208-209) a number of United States Coast & Geodetic Survey charts and 8 official documents and technical publications.

In the Citation of Documents, Volume II, in connection with Mr. Watson's proposed testimony, two publications and charts are listed to support his testimony that the actual

location on the ground of any point on the line intersection of the plane of low water with the shore is a constantly changing thing (371-2, 388-391); that it cannot be determined and fixed as of September 9, 1850 because of the absence of contemporaneous data (373, 378-9, 382, 392-3, 469), and that the low-water mark along the California coast should be taken to mean the average over a period of 18.6 years of the *lower* low waters (II 365); that this "is the official reference datum of the waters of the Pacific Coast" (366-368). The statement of his proposed testimony is further subdivided, with reference to the several subdivisions of the coast line under consideration (II/469B; 495B; 513B and C; and 564B and C).

Since both parties recognize that natural accretions and relictions exist (and agree that they should be ignored) it hardly needs to be proved that the location of any point on the line of intersection of the plane of low water with the shore is a constantly changing thing. Whatever need there may be to determine the low-water mark as of any past date will only be with reference to artificial accretions and the location of the low-water mark at the time they were made. Furthermore, during these proceedings the United States has announced its position as to physical improvements as follows:

> "The Government has taken the position with respect to improvements, physical improvements made, that it does not claim title to them. It does not expect to under any circumstances claim or assert title or take over any improvements which may have been made by the State or by any political subdivision of the State, and we have drafted a bill and have it pending in Congress to make that position clear." (Transcript/127).

The practice of the U.S. Coast & Geodetic Survey and the Corps of Engineers, about which Mr. Watson proposes to

testify, could presumably be correctly ascertained by direct reference to official publications of those government bureaus or by calling on those agencies of government for the desired information.

In the foregoing I have endeavored to state concisely the issues involved at this stage of these proceedings and the nature and form of the evidence proposed to be submitted.

As to the "admission of facts and documents which will avoid unnecessary proof", I find no opportunity for significant simplification. It being conceded that criteria now advanced by the parties have not heretofore been definitely adopted by the United States or established as existing rules of international law, the questions to be determined assume a character which imports, at least argumentatively, wide latitude of reference to developments in the field of international law and to historical and geographical data pertinent to the coastal segments under consideration.

The United States, absent any such established criteria, in effect disclaims as "inland" or "enclosed" waters bays enclosed to the extent measured by the geometric formula it proposes (Cf. *Cunard* v. *Mellon*, 262 U.S. 100, 122-123) just as by stipulation it has already purported to disclaim the area of San Francisco Bay and San Diego Bay (Cf. Order and Decree, 332 U.S. 804) and at least a part of San Pedro Bay. But beyond that it does not go except to recognize that allowances may have to be made for "existing agreements and 'historic' situations" as to which it contends that the burden should be upon California (A/15). The United States, to support its position, lists a certain number of documents, particularly records of proceedings at The Hague Conference of 1930, and offers to put them

in evidence if they are not subject to judicial notice. At the same time it fully reserves the right to refer to matters of common knowledge and to other documents or events of which the Court would take judicial notice.

California, absent such criteria, contends for a much more extensive area of coastal waters shoreward of the base line of the marginal belt and, asserting that the United States, in making the determination, is free to be guided by what it considers to be its best interests, it proposes to introduce the oral testimony and documents relating to international practices, historical events, physical and geographical factors, use and occupancy of the area, maritime trade routes, etc., outlined above. The international practices are dealt with in the proposed commentary by Judge Hudson and the historical aspects in the proposed commentary by Dr. Caughey. The physical, geographic and oceanographic factors, together with the nature and quantitative extent of the sheltering of the waters and the quantitative extent and value of their use and occupancy are dealt with in the proposed oral testimony of the experts, Fitzgerald, Grant, Shepard and Putnam, and in the proposed testimony of the fact witnesses. That the outlying islands shelter to some degree the waters between them and the mainland, and that the use and occupancy of these waters for maritime commerce includes some commerce that is not oceangoing might, perhaps, be a fact so notorious as to be within the range of judicial notice (Cf. *The Apollon,* 9 Wheat, 362, 374; *Peyroux* v. *Howard,* 7 Pet. 324, 342; *Sparrow* v. *Strong,* 3 Wall. 97, 104; *Brown* v. *Piper,* 91 U.S. 37, 42; *Clark* v. *United States,* 99 U.S. 493, 495; *Hoyt* v. *Russell,* 117 U.S. 401, 404; *United States* v. *Rio Grande Dam & Irrigation Company,* 174 U.S. 690; *Parker* v. *Brown,* 317 U.S. 341, 363). But if the quantitative degree of sheltering and the quantitative extent and value of the occupancy and use are to be given significant weight in the judgment

of the Court, as California contends they should be, then the proposed testimony would, I should suppose, assume a different aspect of importance. In any event, the many documents listed by California—statutes, government charts and reports, historical and statistical treatises, etc., are of such a character that there has been no suggestion that their text or their authenticity is or would be disputed or made the subject of unnecessarily technical proof. California, like the United States, reserves the right to refer to additional documents and in the lists of documents already submitted it frequently includes, without particularizing, general reference to California Statutes, Municipal Records, entire volumes of history, exploration and the like, and other works of general reference.

With the documentary material thus outlined, and subject to these reservations, and having regard to the wide divergence of the contestants' views as to how the Court should be informed, or inform itself, on these matters, it has been found impracticable to presently delimit the field by selection and admission of particular documents or by further admission of matters of fact.

Respectfully submitted,

WILLIAM H. DAVIS

New York, New York,
May 22, 1951.

Note 1: The stated position of the United States as to the status of the waters within a strait (whether "territorial sea" or "high sea") is that in the case of straits connecting two areas of high sea, where the land on each side of the strait belongs to a single nation, and both entrances to the strait do not exceed six nautical miles in width, all of the waters of the strait are in the marginal belt; if both or either entrance exceeds six nautical miles in width, the marginal belt is measured from the low-water mark along

each coast. Where there is a group of islands with the islands less than six nautical miles apart (as is true along the outer edge of the Santa Barbara Channel), the respective marginal belts around such islands overlap and constitute in effect a single continuous belt. Where a small area or pocket of high sea is totally surrounded by the marginal belt (as, for example, where an archipelago of offshore islands is near the shore of the mainland and the respective marginal belts overlap at each end) the surrounded area of high sea is assimilated to the marginal belt of the country; if there is a pronounced concavity or indentation of high sea situated either between marginal belts drawn around islands or between the belt around an offshore island and the belt adjacent to the mainland, such a concavity of high sea may be assimilated to the marginal belt if a line drawn across the entrance of the concavity is not more than four nautical miles in length and the area enclosed by such line and the respective belts is greater than the area of a semi-circle the diameter of which is equal to the length of such line (A/19-20).

APPENDIX I

The stated position of the parties as to the boundary[10] of each of the seven segments in dispute is as follows:

1. The Segment from Point Conception to Point Hueneme (Group 1(a)—Chart 5202)

Boundary Claimed by the United States: The ordinary low-water mark of the Pacific Ocean along the mainland of California beginning at Point Conception and extending therefrom in an easterly direction to Point Hueneme, following the sinuosities of the ordinary low-water mark, except where the ordinary low-water mark is interrupted by the mouths of Goleta Slough, Carpenteria Creek, Rincon Creek, Ventura River, and Santa Clara River, at which places the line is a straight line drawn across the mouths of all such tributary waterways in the general direction of the coast from the point where the said low-water mark leaves the open coast and enters the tributary waterway to the point on the opposite shore where the said low-water mark emerges from the tributary waterway and again follows the shore of the open coast (A/2-3).

Boundary Claimed by California: This segment, together with segments 1(b), 1(c) and 2(d), should, California contends, be embraced in an overall unit area of inland waters. If the boundary of this overall unit area should not be adopted, then two alternative and progressively more restricted boundaries are proposed (I/5-10).

a. *Proposition 1* (Charts 5101 and 5202)

"*The over-all unit area of inland waters* proposed by California is the area landward of the following base-line from which the three-mile belt of marginal sea should be measured:

"From Point Conception to Richardson Rock;
"Thence to Point Bennett on San Miguel Island;

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[10] The boundary lines claimed by the parties are shown on the charts accompanying this report; the United States' proposals in red and California's in green.

"Thence to unnamed rock opposite Adams Cove, to headland west of Judith Rock, along the outermost rocks lying off the southern shore of San Miguel Island to Judith Rock and across Tyler Bight to Crook Point and to Cardwell Point;

"From Cardwell Point to Sandy Point on Santa Rosa Island;

"Thence to Bee Rock, to Cluster Point from headland to headland and to South Point;

"Thence across Johnsons Lee to Ford Point and along the outermost rocks to East Point on Santa Rosa Island;

"Thence to Gull Island off Santa Cruz Island;

"Thence to the reef extending northward from Begg Rock;

"Thence to the rocks lying off the northwestern extremity of San Nicolas Island, and from headland to headland along the southern shore of San Nicolas Island to the extremity of the sand-spit on the eastern end of San Nicolas Island;

"Thence to Castle Rock off the Northwestern extremity of San Clemente Island;

"Thence to the headland west of West Cove, across West Cove to a headland about three miles south, to Eel Point, across a bay to the south headland thereof, across Seal Cove to Mail Point, from headland to headland and to the most western island at China Point;

"Thence to the most southern island at China Point across Pyramid Cove to White Washed Rock and to the eastern extremity of Pyramid Head;

"Thence to Church Rock off the eastern tip of Santa Catalina Island;

"Thence along the off-lying rocks to Seal Rocks, and to Jewfish Point;

"Thence to the eastern jetty at the entrance to Newport Bay."

b. *Proposition 2* (Charts 5101 and 5202)

"*A first alternative unit area of inland waters* would be bounded by a line as follows:

"From Point Conception to Gull Island, as in the preceding paragraph;

"From Gull Island to the eastern headland of Laguna Harbor, across headlands to Bowen Point, from headland to headland to Sandstone Point;

"Thence along outlying rocks, across Yellowbanks Anchorage and across Smugglers' Cove to San Pedro Point;

"Thence to the western extremity of the westernmost of the Anacapa Islands and thence to Cat Rock;

"Thence to the southernmost point of the middle island, to the eastern extremity of the Anacapa Islands, to Arch Rock;

"Thence to the western extremity of Santa Barbara Island, thence to Sutil Island and along the western and southern shores of Sutil Island to the southernmost point of Santa Barbara Island;

"Thence across the bay south of Catalina Harbor and Little Harbor to Ben Weston Point on Santa Catalina Island;

"Thence along the southern shore of Santa Catalina Island to Salta Verde Point, to Church Rock, and to Seal Rocks;

"Thence along the eastern shore of Santa Catalina Island to Jewfish Point;

"Thence to the eastern jetty at the entrance to Newport Bay."

c. *Proposition 3* (Charts 5101 and 5202)

"*A second alternative unit area of inland waters* would be bounded by a line drawn as follows:

"From Point Conception to Anacapa Island Light, as in the preceding paragraph;

"From Arch Rock to Point Hueneme;

"Thence across the entrance to Port Hueneme and along the shore of the mainland taking account of off-lying rocks to Laguna Point;

"Thence across the bay lying seaward of Mugu Lagoon to Point Mugu;

"Thence along the shore of the mainland taking account of off-lying rocks, to the reef seaward of a small rock 150 yards southward of Point Dume;

"Thence to the rock 250 yards southwestward from Point Vicente;

"Thence to West End on Santa Catalina Island, to Eagle Rock and to Ribbon Rock;

"Thence across the bay south of Catalina Harbor and Little Harbor to Ben Weston Point on Santa Catalina Island;

"Thence along the southern shore of Santa Catalina Island to Salta Verde Point, to Church Rock and to Seal Rocks;

"Thence along the eastern shore of Santa Catalina Island to Jewfish Point;

"Thence to the eastern jetty at the entrance to Newport Bay."

2. Segment of San Pedro Bay (Group 1(b)—Charts 5101 and 5147)

United States: Recognizes the waters of San Pedro Bay as "inland waters" when delimited by a straight line beginning at a point on the ordinary low-water mark of the Pacific Ocean eight hundred and fifty (850) yards distant in an easterly direction from the Point Fermin lighthouse (as shown on United States Coast and Geodetic Survey Chart No. 5147, corrected to June 30, 1947) and near latitude 33°42′23″, longitude 118°17′06″, thence running in an easterly direction through a point 300 feet due south of the easterly extension of the Navy mole and breakwater to the point of intersection with the ordinary low-water mark of the Pacific Ocean in front of the city of Long Beach (A/3).

California: Embraced within each of the three alternative propositions stated with reference to segment Group 1(a) above.

3. Segment from San Pedro Bay to the Western Headland at the Entrance to Newport Bay (Group 1(c) —Chart 5101 and old Chart 671)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at the point at which the straight line constituting the seaward limit of San Pedro Bay intersects said ordinary low-water mark in front of the city of Long Beach and extending therefrom in a southeasterly direction to the point where the ordinary low-water mark is intersected by the western headland at the entrance to Newport Bay, following the sinuosities of the ordinary low-water mark, except where such lower-water mark is interrupted by the mouths of Alamitos Bay (San Gabriel River), Anaheim Bay, and the Santa Ana River, at which places the line is a straight line joining the headlands of all such tributary waterways." (A/3).

California: Embraced within the three alternative propositions stated with reference to segment Group 1(a) above. "If, for any reason, it becomes necessary to determine the outer limits of * * * San Pedro [Bay], apart from the larger areas of inland waters" described in its three propositions, these outer limits should be defined as follows: San Pedro Bay, a line drawn from Point Fermin to a point referred to as Point Lasuen, as indicated on map Old 671 (I/10).

4. Segment of Santa Monica Bay (Group (2d)— Chart 5101)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at Point Dume and extending therefrom along the shore to Point Vicente, following the sinuosities of the said low-water mark, except where such low-water mark is interrupted by the mouth of Ballona Creek, at which place the

line is a straight line" joining the headlands of Ballona Creek (A/5).

California: Embraced within each of the three alternative propositions stated with reference to segment Group 1(a) above. If, for any reason, it becomes necessary to determine the outer limits of Santa Monica Bay apart from the larger areas of inland waters described in these three propositions, these outer limits should be defined by a line drawn from Point Dume to Point Vicente, as adjudicated by the California Supreme Court in *People* v. *Stralla,* 14 Cal. 2d, 617; 96 Pac. 2d, 941.

5. The Segment at Crescent City (Group 2(a)—Charts 5702 and 5895)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at Battery Point and extending therefrom in an easterly and southerly direction to the mouth of Cushing Creek, following the sinuosities of the ordinary low-water mark, except where such low-water mark is interrupted by the mouth of Elk Creek, at which place the line is a straight line" joining the headlands of Elk Creek (A/4).

California: Waters delimited around St. George Reef by a line drawn from Prince Island off Pyramid Point to Northwest Seal Rock, back to Southwest Seal Rock, thence to Whale Rock, thence to Hump Rock, thence to Star Rock, thence to Castle Rock, thence to White Rock, thence to Steamboat Rock, thence to Round Rock, thence to Sister Rocks, and thence to False Klamath Rock. Alternatively, California states that the line may be drawn from the outermost island or rock off the extremity of Battery Point to Steamboat Rock, thence to Round Rock, and thence to the rocks off the point between the mouths of Cushing Creek and Nickel Creek. (See Crescent City Bay, Chart 5895, California's Exhibit 2, and California Statutes 1949, Chapter 65).

6. The Segment at Monterey Bay (Group 2(b)—Chart 5402)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at Point Santa Cruz and extending therefrom along the shore to Point Pinos, following the sinuosities of the ordinary low-water mark, except where such low-water mark is interrupted by the mouths of the San Lorenzo River, Soquel Creek, Aptos Creek, Pajaro River, Elkhorn Slough, and Salinas River, at which places the line is a straight line" joining the headlands of all such tributary waterways (A/4).

California: Line drawn from the rocks off Point Santa Cruz to the rocks off Point Pinos (as adjudicated by the California Supreme Court in *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235; 252 Pac. 722).

7. Segment of San Luis Obispo (Group 2(c)—Charts 5302 and 5386)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at Point San Luis and extending therefrom along the shore in an easterly direction, following the sinuosities of the ordinary low-water mark, except where such low-water mark is interrupted by the mouth of San Luis Obispo Creek, at which place the line is a straight line" joining the headlands of such tributary waterway (A/5).

California: Line drawn from the extreme point of Point San Luis to the extremity of Point Sal (see San Luis Obispo Bay, Chart 5386, California's Exhibit 4).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 6, Original.

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE STATE OF CALIFORNIA.

BRIEF IN RELATION TO REPORT OF SPECIAL MASTER OF MAY 22, 1951.

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UNITED STATES OF AMERICA, *Plaintiff*

v.

THE STATE OF CALIFORNIA.

BRIEF IN RELATION TO REPORT OF SPECIAL MASTER OF MAY 22, 1951.

SUMMARY OF PRIOR PROCEEDINGS

On October 27, 1947 the Court entered its decree in this case, reading in part as follows:

"1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and

> bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein." (332 U. S. 804)

Jurisdiction was reserved at that time to enter such further orders or Decrees as might be necessary or advisable.

The above quoted decree adjudged that the United States has paramount power in a three mile belt of water which was known to lie offshore but whose limits had not been precisely described. The decree defined the belt only in the following general terms:

(a) it lies "seaward of the ordinary low water mark on the coast of California";

(b) it lies "outside of the inland waters";

(c) it extends "seaward three nautical miles."

Since the general terms of this decree did not define inland waters or low water mark, the decree was not self-executing and further proceedings were required to identify the location of the marginal belt.

In January 1948 the United States petitioned the Court for a supplemental decree to determine the exact location of the marginal belt along three particular segments of the California coast which include all of the submerged lands from which oil is now being produced. These three segments comprise in the aggregate some 100 miles of California's 1100 mile shore line. The petition asked that these three segments of submerged lands be adjudged to constitute "segments of that area underlying the Pacific Ocean described in paragraph 1 of the decree of this court entered on October 27, 1947" in which the United States has "paramount rights and full dominion" (i.e., the 3-mile belt of marginal sea).

California objected to the entry of the supplemental decree on the grounds that all three segments described in plaintiff's proposed decree are not within the marginal sea,

but constitute a part of the inland waters of California. California further alleged that issues of fact exist as to whether any of the segments described in plaintiff's proposed decree are within the marginal belt or constitute inland waters of California. Among these factual issues were questions as to the location of ordinary low water mark along the open coast and as to the existence and location of various bays, harbors, ports, channels, river mouths and other water areas claimed by California to be "inland waters." California prayed for the appointment of a master to take evidence and make findings of fact and conclusions of law (subject to review by this court) as to these issues. Since the Court's decree of October 27, 1947 applies to the entire coast line of California from Oregon to Mexico, California asked that the Master be instructed to make findings of fact and conclusions of law as to the line along the entire coast of California which divides the marginal sea from the inland waters, ports, bays and harbors.

On June 21, 1948, the Court denied California's prayer to have "the entire line" adjudicated "at this time". 334 U.S. 855) But the Court authorized the appointment of a Special Master, to make recommendations to the Court (1) "as to what particular portions of the boundary call for precise determination", and (2) to recommend "an appropriate procedure to be followed in determining the precise boundary of such segments". On July 2, 1948, Honorable D. Lawrence Groner was appointed Special Master. On February 12, 1949, William H. Davis, Esquire, was appointed Special Master to succeed Judge Groner who had been forced to retire because of ill health.

On April 21, 1949 California filed an extensive trial brief with exhibits at the request of Special Master Davis. Although California listed and described 104 segments or areas along its coast of over 1100 miles whose status requires definition, it submitted for inclusion in this proceed-

ing only six segments in addition to the three segments recommended by the Plaintiff.

On June 6, 1949, Mr. Davis filed his first report (dated May 31, 1949). In this report he rejected plaintiff's contention that only the three segments of the submerged lands which contain oil should be adjudicated at this time and recommended in addition the adjudication of four of the six segments proposed by California. This recommendation was based on the ground that,

> "It has seemed to me that a wiser and fairer procedure would be to make now an intelligent selection adequate to present in reasonably significant variety the principal questions that will have to be decided before particular boundary lines or locations can be precisely determined." (p. 3)

Mr. Davis also recommended as an "appropriate procedure" that the Court appoint a master to take evidence as to the lines "which in said seven coastal segments" divide the areas underlying the marginal sea from the areas lying "landward of the ordinary low water mark on the coast of California and within the inland waters of that State, and the proper mode of locating said line, and report the same to the Court, but without findings and conclusions." Mr. Davis felt that it would be inadvisable to entrust to a Master the duty of making such findings or conclusions because of the nature of the "questions of ultimate fact and of law in these proceedings." He recommended that if the Court desired such findings or conclusions, "a special court of federal judges" should be appointed for this purpose.

On June 27, 1949, the Court ordered the report of the Special Master received and filed. (337 U.S. 952) On the same day Mr. Davis was continued in office as Special Master with instructions to proceed with respect to the seven coastal segments enumerated in his report of May 31, 1949, to consider,

"(1) a simplification of the issues;

"(2) statements of the issues and amendments thereto in the nature of pleadings;

"(3) the nature and form of evidence proposed to be submitted, including admission of facts and of documents which will avoid unnecessary proof; and report thereon to the Court."

On May 22, 1951, Mr. Davis filed his report in response to the Court's order of June 27, 1949. This report concludes, as did the Master's previous report, that before any survey of the line of demarcation can be undertaken, the following questions must be determined:

1. What is the status (inland waters or open sea) of particular channels and other water areas between mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn;

3. By what criteria is "the ordinary low-water mark on the Coast of California" to be ascertained.

These questions constitute the "issues" which the Master finds are "involved at this stage of these proceedings." (p. 34)

The report contains a concise statement of the "position" of each party with respect to each of these "issues", and a summary of the nature and form of the evidence proposed to be submitted by each party on each of the three "issues" above stated. The Master concludes that it is impracticable presently to delimit the documentary material outlined in the report "by selection and admission of particular documents or by further admission of matters of fact." (p. 36) The report contains no specific recommendation as to further procedure.

On June 4, 1951, the Court entered its order that the report be received and filed and that

> "Briefs of the parties in relation thereto may be filed . . . " (341 U.S. 946)

This brief is in response to that order.

SCOPE OF BRIEF*‡

From the Court's order that the parties may file briefs "in relation" to the Master's Report, California assumes that the Court desires at this time a statement of our comments on or objections to the Master's Report. We do not understand that the Court desires "at this stage of the proceedings" a complete and final brief on the merits of the issues presented. It is our view that testimony and evidence are essential to a final determination of the issues.

For convenience, California's brief will follow in general the organization of the Master's Report. After a short introductory statement of the nature of the problem of determining the boundaries of the marginal sea, the brief will address itself to the contention which the Master noted but regarded as beyond the scope of his assignment: namely, that the determination of these boundaries is a political and not a justiciable question. Following this, the brief will comment on and amplify the Master's summary of California's position on the three issues stated by the Master. In the course of discussing and expanding the Master's statement of California's position, reference will be made to the nature and form of evidence proposed to be submitted by California. Finally, in view of the fact that the Master made no specific proposal as to future procedure, California will state what it believes to be the most expeditious procedure to terminate this litigation.

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* Emphasis in quotations, throughout this brief, has been added.

‡ This brief will frequently refer to two volumes which were submitted by California at the request of the Special Master and which are now on file with the Court: (1) "Summary of Testimony of Typical Witnesses," and (2) "Citation of Documents." The scope of these volumes is summarized in the Master's Report, p. 11, note 5.

NATURE OF THE PROBLEM

The object of the present proceeding, as stated above, is to identify and describe the limits of the belt of water within which the Federal Government is held to possess "paramount rights" and "full dominion".

The width of this marginal belt, i.e., three nautical miles, is a constant factor and is not in issue in this case.[1] But no criteria were given in the court's decree, (and none exist elsewhere) for ascertaining the "ordinary low water mark" or for defining and locating the seaward limit of the "inland waters". It is these questions which give rise to the "issues" which the Master finds must be disposed of at this stage of the proceeding.

The physical or geographical conditions which exist on any "coast line" may involve two distinct situations. The first occurs where the mainland confronts the open sea and there are no off-lying islands, channels, bays, harbors, or river mouths. In such situations the problem of defining and locating inland waters will, of course, be entirely absent, and the "ordinary low water mark" when ascertained and surveyed will become the base line for measuring the three mile marginal belt.

The other situation occurs where there are bays, harbors, ports, river mouths, channels or off-lying islands which inclose or limit bodies of water which may constitute "inland waters" in a legal and political sense. In such a situation it is necessary to fix and describe a line which constitutes the seaward or outer limits of such bodies of water. The low water mark plays no part in determining such a line except where it is necessary to locate the point at which this line touches the land at the entrance of a bay, or where it touches the islands in cases of channels. Where there

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[1] Despite the fact that many other nations are claiming marginal belts of greater width, the United States has continued to adhere to three miles as the proper width. See Boggs, *National Claims in Adjacent Seas*, 41 Geog. Rev. 183 (1951).

are inland waters, this line constituting their seaward limit when ascertained will become the base line from which the three mile marginal belt must be measured.

When the base line of the marginal belt is determined in the two situations above described, the entire marginal belt will be located and defined, because the seaward limit of this belt is in all places three miles seaward from the base line. Immediately seaward of the marginal belt lies the high seas.[2] Consequently, the fixing of this base line will automatically determine (1) the extent and limits of the inland waters (2) the precise location of the three mile marginal belt and (3) the line of demarcation between marginal belt and high seas.

It is recognized by both parties, that despite the importance of this base line, no criteria for its determination have "heretofore been definitely adopted by the United States or established as existing rules of international law, . . ." (Master's Report, p. 34 and 35; see also p. 8). Strange as it may seem, this baseline, which automatically determines the external boundary of the United States, has never been established by any agency of the Government.

The practices of various nations in defining baselines are widely divergent. Some nations claim the waters of all bays along their coasts as inland waters, regardless of size, while other nations claim only the waters of bays having particular dimensions. Many nations measure the marginal belt from the outermost islands off the coast, while other nations

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[2] The area of high seas or "contiguous zone" lying between the outer limit of this marginal belt and the edge of the continental shelf has in reecnt years become the subject of various claims by maritime nations including the United States. (Proc. 2667 and Exec. Order 9633, both of Sept. 28, 1945.) In this proclamation, the United States asserted jurisdiction over the natural resources of this area but specifically stated that, "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected." (See generally, Young, the Legal Status of Submarine areas beneath the High Seas, 45 A.J.I.L. 225, (1951).)

take account only of islands within limited distances from the mainland.

In view of the situation above described, the United States now has a very considerable measure of freedom in determining what are its inland waters and hence what is the baseline from which its belt of marginal sea is to be measured. Within the broad limits which have been generally recognized by the nations of the world, a wide range of choice is open to the United States. It is free to take account of its national interest as determined not only by geographical and historical conceptions, but also by its special position with respect to national defense and international relations.

Whatever agency of the Federal Government eventually fixes the location of our marginal belt must bear in mind the full implications of its decision. Among these are the following:

(a) Any criteria adopted for the seven segments now before the court must be susceptible of application in other comparable parts of the California coast and of every other coastal state. The Master selected these seven segments because, "the development and the application of criteria in the recommended areas might be expected to lead to generalizations applicable without too much difficulty to other areas." (Master's Report of May 31, 1949, p. 344.)

(b) The limits of the inland waters and the marginal sea must be determined on the basis of the same criteria as would be applied if this were a proceeding between the United States and a foreign nation. This is made clear by the rationale of the *California* decision.

The ground on which the United States was held to have paramount power in the marginal sea as against an individual state was that control of that water area is essential to the fulfillment of its responsibilities of national external sovereignty. Primary emphasis was placed by the Court on the statements that actions taken in the marginal belt

involve questions which are "for consideration among nations as such" and which may be the subject of "treaty or similar international obligations." (332 U.S. 19, 35)

In view of this rationale, it is not possible to contend that the boundaries of the marginal belt are at one place as between the United States and an individual state and at another, different place as between the United States and a foreign nation. The reason for this is that under the *California* decision, the rights of the federal government are paramount to those of the state *only* in the "international domain" where the federal government's responsibilities of national external sovereignity exist. If an area should be established to be "inland waters" in a proceeding between the United States and a foreign nation, the area would not be international domain and consequently the United States would not have paramount power as against an individual state. Conversely, if an area is determined to be marginal sea in a proceeding between the United States and an individual state, that is a finding that the area *is* international domain and consequently it would hardly be candid for the United States to contend in a subsequent proceeding with a foreign nation that the area *is not* international domain.

The inconsistency produced by an attempt to apply a double standard in fixing the boundaries of the marginal sea demonstrates the necessity for determining in the present proceeding boundaries *which will come within the limits of international practice* and on which the United States will stand in any international controversy. The necessity for such a single standard is emphasized by the fact that the decisions of the United States Supreme Court, even in cases between private litigants, have been relied upon in international arbitrations to which the United States was a party as decisive of the law of this country, and as admissions against our national interests. This consideration is particularly important at the present time because the United States has accepted the compulsory jurisdiction of the International Court of Justice.

(c) As we have said, the determination of the baseline of the marginal sea will automatically determine the extent and limits of the inland waters, the location of the marginal belt, and the line of demarcation between marginal belt and high seas. Therefore, our national interests clearly require that consideration be given to the powers which may be exercised in and the uses which may be made of each of these three water areas by the United States and by foreign nations.

Inland Waters. The inland waters and the areas above low water mark are the sole and exclusive concern of the nations within whose boundaries they lie. The authority of a nation over its inland waters is, as against other nations, absolute and exclusive. Inland waters are part of the "national domain." Even the right of innocent passage does not exist in inland water.

Marginal Sea. In contrast to inland waters and the areas above low water mark, external considerations are held to be dominant in the three mile marginal belt. The purposes for which this belt exists cover a wide range of national and international interests. Among these are:

(i) the enforcement of neutrality regulations,

(ii) the control of visits of foreign warships, including submarines,

(iii) the exclusive control of airspace above inland waters and marginal sea,

(iv) the exclusion of aliens from fisheries,

(v) the administration of maritime navigation,

(vi) the regulation of pilotage and anchorage,

(vii) the prevention of the pollution of waters, and

(viii) the protection of fortifications and harbor installations.

The contrast between the marginal sea and inland waters is further shown by the Supreme Court's holding in this case that actions taken in the marginal belt involve questions which are for consideration among nations and which may be the subject of international agreements. 332 U.S. at 35. These foreign interests, as the Supreme Court said in *United States* v. *Texas*, are of sufficient scope and importance to place the marginal belt in the category of "international domain." 339 U.S. 707, 719.

High Seas. In the high seas which lie immediately seaward of the marginal belt, the rights and powers of the United States are vastly different from and smaller than its powers in the marginal belt. Conversely, foreign nations can carry on numerous activities in the high seas which are not permissible in the marginal belt. This is strikingly illustrated by the testimony of Attorney-General (now Associate Justice) Tom C. Clark before a Congressional Committee that, "As a matter of fact, a foreign nation can run its battleships up and down just outside the three mile belt." (Joint hearings on S-1988 before the Judiciary Committees of the 80th Congress.) Justice Clark might have added that foreign planes can fly just outside the three mile belt and photograph structures on the shore from that distance.

The above discussion shows that the paramount powers and rights of the federal government in the marginal belt are not limited to the control of oil. National interests exist in this belt which far transcend in importance the question whether state or federal officials shall administer certain oil fields. The marginal belt is, as the Court said, the "protective belt" which is so vital to national defense. It is also the belt which is to be used by the federal government for the many important functions and purposes above described. The problem under consideration requires the determination of the most advantageous location for the exercise by the federal government of *all* its paramount rights and powers.

Moreover, the location of the marginal belt, as we have shown, is not solely a national concern. It fixes the area in which other nations may exercise those rights which give that belt its international character. Since it will determine the proximity to our shores of the areas in which foreign nations may exercise these rights, the location of this belt may well involve questions of high national policy which may be of the greatest importance in the protection of our national interests in this period of international tension and strife.

I. DETERMINATION OF THE LOCATION OF THE MARINGAL BELT IS A POLITICAL AND NOT A JUSTICIABLE QUESTION.

In describing the nature of the problem presented by these proceedings, it was shown that the location of the marginal belt involves questions of international relations for which there are no presently established criteria for a judicial decision. As we shall show, the determination of such questions is beyond the limits of the judicial function.

Very early in our national history, the Supreme Court recognized its inability to decide questions which fall into the category of "political questions." In *Marbury* v. *Madison*, 1 Cr. 137, 165-66 (1803) Chief Justice Marshall said that certain questions cannot be examined by the Court because "the subjects are political; they respect the nation, not individual rights . . ." Since that decision, the Supreme Court has consistently followed that principle.

A. The Location of Our Marginal Belt Involves Questions of International Relations.

Questions involving international relations have uniformly been regarded as "political questions." Decisions illustrating the broad range of questions which have been held to be beyond the limits of the judicial function for this

reason are cited in the margin.[3] The basis of the principle that questions of international significances are political and not justiciable was summed up in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, (1948), where the Court held that orders approved by the President which grant or deny applications for authority to engage in overseas or foreign air transportation are not subject to judicial review because they involve matters of international policy. The Court said,

> ". . . the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.*" (p. 111)

The determination of our national external boundaries or of our sovereignty over any given area falls within the category of questions which, because of their international consequences, are political and not justiciable. This has been established by a long line of Supreme Court decisions.

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[3] (1) Determination of a state of war between foreign nations or of the status of independence or belligerency of a foreign country. *United States* v. *Palmer*, 3 Wh. 610 (1829); *Divina Pastora*, 4 Wh. 52 (1829) (2) Ratification, effect and breach of a treaty. *Doe* v. *Braden*, 16 How. 635, 656 (1853); *Ware* v. *Hylton*, 3 Dall. 199, 260 (1796). (3) "What government is to be regarded here as representative of a foreign state." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938); *United States* v. *Pink*, 315 U.S. 203, 228-9 (1942). (4) Determination of the end of a war. *Ludecke* v. *Watkins*, 335 U.S. 160 (1948). (5) Immunity from seizure of the vessel of a foreign government. *Ex Parte Peru*, 318 U.S. 578 (1943).

In *Foster* v. *Neilson*, 2 Pet. 253 (1829), the United States claimed certain land in Louisiana on the ground that Spain had ceded the land to France and that France in turn had ceded it to the United States. The defendant in the case contended that Spain had not made such a cession. In holding that the question was not justiciable, the Court, speaking through Chief Justice Marshall, said,

> "A question like this *respecting the boundaries of nations*, is, as has been truly said, more a political than a legal question; and, in its discussion, the courts of every country must respect the pronounced will of the legislature."

To the same effect, see *United States* v. *Reynes*, 9 How. 127 (1850); *United States* v. *Arredondo*, 6 Pet. 491 (1832).

This same view was taken in *Jones* v. *United States*, 137 U.S. 202 (1890), where the Court was considering a challenge to the jurisdiction of the United States over the Guano Islands which had been acquired pursuant to an Act of Congress in 1856. The Court said,

> "Who is sovereign, *de jure* or *de facto* of a territory is not a judicial but a political question . . ." (137 U.S. at 212)

Referring to this quotation from *Jones* v. *United States*, the Court in *Oetjen* v. *Central Leather Company*, 246 U.S. 297, 302 (1917), said that, "This principle has always been upheld by this Court, and has been affirmed under a great variety of circumstances." See *Ex Parte Cooper*, 143 U.S. 472, 499-500, 503-4 (1892). As recently as 1948, the Supreme Court recognized the political nature of questions concerning our national external boundaries when it stated in *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380 that ". . . the determination of sovereignty over an area is for the legislative or executive departments."

It is the international implications of a determination of our national external boundaries or of our sovereignty over an area that makes such determinations beyond the limits

of the judicial function. This is shown by the Court's opinion in *United States* v. *Texas,* 143 U.S. 621 (1892). That case held that the determination of the *internal* boundary between the State of Texas (after it had entered the Union) and an adjoining State was not a political question. But in so holding, the Court carefully distinguished *Foster* v. *Neilson* and other cases cited above on the ground that "they relate to questions of boundary between independent nations." (143 U.S. at 639). This sharp distinction between questions of internal and external boundaries makes it clear that it is the international significance of the determination of a national external boundary which makes it a political question.

Determination of the baseline of the marginal sea falls squarely with the category of cases which are political and not justiciable because they involve the fixing of a national external boundary. As was pointed out above, the fixing of the baseline will automatically determine (1) the extent of the inland waters of the United States, (2) the precise location of the three-mile marginal belt, and (3) the line of demarcation between the marginal belt and high seas. The location of these boundaries and the limits of our sovereignty are inseparably related; the extent of our sovereignty is necessarily settled when the boundary is ascertained. Consequently, the fixing of the baseline of the marginal belt will determine for the first time the political and geographical frontier of our nation.

Plaintiff concedes that the fixing of the outer limits of inland waters "present[s] problems which have international aspects" (Master's Report, p. 8.) The fact that the location of the marginal sea is a question of international relations is fully demonstrated by the Court's decisions regarding this offshore belt. Indeed, as the Court said in *United States* v. *Texas,* 339 U.S. 707, 719.

> "Yet, as we pointed out in *United States* v. *California,* once low-water is passed the international domain is reached."

Just as the marginal belt is in the "international domain," so the determination of its boundaries is a question which is in the realm of international relations.

In the *California* opinion, the Court repeatedly emphasized the international character of all actions in or relating to the marginal belt. The Court pointed out that the authority of a nation to exercise territorial jurisdiction over the three-mile belt adjacent to the coastline has become a precept of international law only within relatively recent times. (332 U.S. 33)

Not only did the Court emphasize that the existence of the three-mile belt is dependent on international law, but it went on to say that whatever the adjacent nation does in its three-mile belt has an impact on foreign nations. The Court said,

> "But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. See *United States* v. *Belmont*, 301 U.S. 324, 331-332. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement." (332 U.S. at 35)

Moreover, the responsibilities of national external sovereignty in this offshore area provided the basis for the Court's decision that California did not own the marginal belt. To enable the federal government to fulfill its responsibilities with regard to international relations, national defense and world commerce, the Court held that it was necessary for the United States to have paramount rights in the marginal belt. That these foreign and external concerns are indeed the rationale of the California decision is best illustrated by a series of brief excerpts from the Court's opinion:

"The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to *protect this country against dangers* to the security and tranquility of its people *incident to the fact that the United States is located immediately adjacent to the ocean.*" (U. S. v. California, 332 U.S. at 29.)

"The ocean, even its three-mile belt, is thus of *vital consequences to the nation in its desire to engage in commerce and to live in peace with the world;* it also becomes of crucial importance should it ever again become impossible to preserve that peace." (332 U.S. at 35)

"And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, *if wars come, they must be fought by the nation.*" (332 U.S. at 35.)

"The Government also appears in its capacity *as a member of the family of nations.* In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of constitutional responsibilities requires that it have power, unencumbered by State commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it." (332 U.S. at 29)

"and insofar as the nation *asserts rights under international law,* whatever of value may be discovered in the seas next its shores and within its protective belt, will most naturally be appropriated for its use." (332 U.S. at 35)

"Protection and control of it [the marginal belt] has been and is a function of national external sovereignty." (332 U.S. at 34)

The sum of the matter is that the *California* opinion leaves no doubt but that the marginal sea is a creature of international law. It was born of general international acceptance. Activities in the belt are the concern of all nations. The rights of the adjacent nation in the belt are based on considerations of external sovereignty.

Determination of the boundaries of this marginal belt, like all activities in connection with the area, is a matter of international relations. While, as stated above, the United States has a wide range of choice in the determination of the limits of its inland waters and marginal belt, the line must be fixed within the broad limits of international custom and practice. Any other nation may contest action taken by the United States on the ground that it has exceeded these limits. Conversely, the United States' challenge of another nation's inclusion of waters within its inland waters and marginal belt may be resisted on the ground that it has adopted the same criteria as the United States fixes in this case.

Moreover, the distribution of rights among nations will be settled by classifying part of the offshore area as inland water, part as marginal sea, and part as high sea. For instance, if the baseline is fixed on the seaward side of the islands adjacent to our shores, inland waters would occupy a broad belt and the areas in which foreign nations have rights (the marginal sea and the high seas) would be pushed seaward. On the other hand, if the baseline is fixed inside of the offshore islands, or inside the bays and harbors, the inland waters would be narrower and the marginal sea and high seas would be correspondingly closer to the mainland.

To sum the matter up, the fixing of the boundaries of the marginal belt will involve a declaration by the United States of sovereign rights in a precise segment of the offshore area and a determination of the point at which the "international domain" begins. This will *for the first time* define the limits of our sovereignty and is therefore akin to the annexation of new territory into the Union or the establishment of control over a new territory. Such a determination of the geographical and political frontier of the United States for the first time is not the responsibility of the judicial branch of our government.

B. There Are No Criteria for a Judicial Determination of the Boundaries and Location of the Marginal Belt.

The most recent opinion in which the Supreme Court has discussed the factors which make a question political and not justiciable is *Coleman* v. *Miller*, 307 U.S. 433 (1939). There, the Court held that the efficacy of State's ratification of a proposed federal constitutional amendment, where the amendment had been previously rejected by the legislature and where thirteen years had elapsed since the amendment had been proposed, is a political question. In so holding, the Court said,

> "It would unduly lengthen this opinion to attempt to review our decisions as to the class of questions deemed to be political and not justiciable. *In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.* pp. 454-5)

This statement by the Supreme Court makes it clear that a question is political if (1) it is appropriate to attribute finality to the action of the political departments, and (2) there is a lack of satisfactory criteria for judicial decision. We have already shown that this Court has traditionally regarded questions concerning our national external boundaries and involving our international relations as appropriate for final and exclusive action by the political branches of our government.

Both of the parties and the Master agree that there are no legally-established criteria for a judicial decision as to the location of the marginal belt in this case. The Master notes (p. 8),

> "Neither party contends, or proposes to submit any evidence to prove, that the criteria it now advances for answering Question 1 or Question 2 above have heretofore been definitively adopted by the United

States or established as customary rules of international law." (Questions 1 and 2 relate to whether the channels, bays and harbors here in issue are to be considered inland waters.)

The Master emphasized the lack of criteria in summing up his Report of May 22, 1951:

> "* * * *It being conceded that criteria now advanced by the parties have not heretofore been definitely adopted by the United States or established as existing rules of international law*, the questions to be determined assume a character which imports, at least argumentatively, wide latitude of reference to developments in the field of international law and to historical and geographical data pertinent to the coastal segments under consideration." (p. 34)

In summarizing the respective positions of the parties, the Master said:

> "The United States, *absent any such established criteria*, in effect disclaims as 'inland' or 'enclosed' water bays enclosed to the extent measured by the geometric formula it proposes . . ." (p. 34)
>
> "California, *absent such criteria*, contends for a much more extensive area of coastal waters shoreward of the base line of the marginal belt . . . (p. 35)

The reason there are no established criteria for determining the boundaries of the marginal sea is easily explained. It was the view of the Supreme Court that prior to the *California* decision, the respective interests in the marginal belt offshore from the United States had never been authoritatively determined. 332 U.S. at 36. Consequently, there had been no occasion to establish a method of determining the boundaries of the belt.

As pointed out above, no criteria for the determination of the baseline of the marginal sea are supplied by international law. The practices of other nations vary widely. Moreover, the practice adopted by any foreign nation or even a number of foreign nations might be totally unsuit-

able for application in the United States where the economic, political, social, geographical and defense problems are substantially different. S. Whittemore Boggs, Special Adviser on Geography, Department of State, emphasized this lack of existing principles in international law for fixing the boundaries of the marginal belt in an article, *Delimitation of Seaward Areas under National Jurisdiction* in the April, 1951 issue of the American Journal of International Law. The article states,

> "Certainly one of the 'most unsatisfactory portions' of the international law relating to the territorial sea is that with regard to the specific limits of the zones of adjacent sea under national jurisdiction. Problems relating to the limits of these zones fall within two categories: (1) Lack of a generally accepted width of the territorial sea—and perhaps of one or more contiguous zones for specific purposes; and (2) *Lack of well developed, acceptable techniques and principles for the delimitation of the belt of territorial sea, or of any contiguous zone or zones required.*"

The necessity for satisfactory criteria if a question is to be held justiciable is emphasized by the discussion in *Coleman* v. *Miller* as to whether the length of time available for ratification of an amendment is a "political question."[4] The Court said,

> "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. . . . In short, the question of a reasonable time in many cases *would involve,* as in this

[4] Field, *"The Doctrine of Political Questions in the Federal Courts,"* 8 Minn. L. Rev. 485 asserts that the absence of rules by which a judicial decision can be reached is the basic explanation for the classification of questions as political. This article, which was cited by the Supreme Court in the *Coleman* case, states that, ". . . a reading of the cases seems to warrant the statement that the most important factor in the formulation of the doctrine [of "political questions"] is that stated above, namely, a lack of legal principles to apply to the questions presented."

> case it does involve, *an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extention of judicial authority to assert judicial notice* as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable." (pp. 453-4)

These same comments could properly be made with regard to the fixing of the baseline in this case. There are no criteria to be found in Constitution or statute. Just as with the question of a reasonable time, the determination of the baseline of the marginal sea involves "an appraisal of a great variety of relevant conditions, political, social and economic."

The importance of the offshore area is not limited to oil. As the distinguished tribunal in the North Atlantic Fisheries Arbitration said, "Conditions of national and territorial integrity, of defense, of commerce and industry are all vitally concerned with the control of the bays penetrating the coastline." (1 North Atlantic Coast Fishers Arbitration 94.) While this comment had reference only to bays, it applies equally to any inland waters whose outer limits determine the location of the marginal belt. The broad range of peacetime and wartime functions and purposes of the marginal belt has been previously outlined (see p. 11, *supra*). Consequently, the location of its baseline calls for judgments which are "delicate, complex, and involve large elements of prophecy" and which are therefore not within the scope of a judicial proceeding.

The Court itself declared that this protective belt would be of "crucial importance" should it ever "again become impossible to preserve the peace." 332 U.S. at 35. This close relationship between our national security and the

location of the marginal belt makes it vital that the belt be fixed where it will be most advantageous for our national defense. Since there are no satisfactory criteria for the judicial evalution of such vital factors as national security, it must be recognized that this question is political and not justiciable.

C. Nothing in the Opinion In This Case Is Inconsistent with the Contention That Determination of the Boundaries of the Marginal Belt Is a Political Question.

The present proceeding involves the determination *for the first time* of the precise limits of the marginal belt in which the United States has paramount power. The issues and considerations involved in such a determination are markedly different than those which were decided in the opinion of the Court in 1947. Then, the Court was determining the question of the respective interests in a belt of water which was known to be offshore but whose limits had not been precisely defined. Now the question is to determine the specific place in the offshore area in which this belt should be located.

Nothing in the opinion in this case forecloses the contention that the determination of the baseline of the marginal belt is a "political question." This contention was not raised by the briefs or arguments of either party on the merits in this case. Moreover, no consideration was given in the Court's opinion to this issue.

In its brief, California raised the clearly distinguishable issues that there was no case or controversy because (a) there was merely a difference of opinion between state and federal officials as to the respective rights in the offshore area, and (b) it was impossible to identify the subject matter of the controversy. (California Brief in Opposition to Motion for Judgment, pp. 11-12; Appendices, pp. 2-33.) In rejecting these arguments, the Court alluded to the justiciability of the controversy over the rights in the undefined marginal belt. 332 U.S. 24-5. But the context and the cases

cited make it clear that there was no consideration as to whether the fixing of the boundary was a political question.

In fact, the *California* opinion supports the argument that the present proceeding involves political questions not within the limits of the judicial function. In the following statement, the Court recognized that it had to follow in the wake of action taken by the political branches of our Government in determining whether the United States had *claimed* control over an undefined three-mile belt:

> "That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile belt is now a settled fact. . . . and this assertion of national dominion over the three-mile belt is binding on this Court." (322 U.S. at 33-34.)

The determination of the precise location of the marginal belt, since it requires the fixing of the external boundaries of the United States, is even more a political question than was the assertion of the original claim.

II. THE BAYS, HARBORS AND CHANNELS UNDER CONSIDERATION ARE INLAND WATERS AND SHOULD BE SO DECLARED.

If the Court should reject the proposition that the fixing of the boundaries of the marginal sea is a political and not a justiciable question, the Court would then be required to make provisions for the consideration of the evidence and the determination of the location of the boundaries. It is therefore necessary to discuss the proposal submitted by plaintiff's counsel for fixing the boundaries of the marginal sea and the different and additional factors which California believes must be considered in determining those boundaries.

Four of the seven segments here involved are within what California claims constitutes an "over-all unit area of inland waters." If this claim is sustained, these four segments would not have to be considered separately. This

over-all area lies between the mainland and the chain of islands which are part of the State of California and which extend for a distance of approximately 130 miles, roughly following the direction of the shore line of the mainland. Between the islands and the mainland is an "inland passage" extending from Point Conception on the North to Newport Beach or below on the South. These islands establish what is known as an "exterior or political coast line." As we shall presently show, such an exterior coastline drawn from the mainland around the outer edge of such islands is widely used by other nations as the baseline for the marginal belt.

The other three segments lie in Central and Northern California and are entirely outside the over-all unit area. They are Monterey Bay, Crescent City Bay, and San Luis Obispo Bay. A point-to-point description of the respective claims of the parties in each of the seven segments appears in the appendix to the Master's Report, p. 38 et seq. For the convenience of the Court, we shall set forth here a brief description of each segment with an illustrative map, followed by a map showing the over-all unit areas above mentioned.

Monterey Bay. The first map following this page shows the configuration of Monterey Bay which lies about 80 miles south of San Francisco. It is and always has been one of California's most important bays, navigators having used it for shelter since 1595.[5]

The position of plaintiff is that this segment does not in fact constitute a bay and that the base line of the marginal belt should follow the inner curve of the shore line. California maintains that this bay in its entirety is an inland water, the seaward limit of which is the line shown on the opposite map.

Crescent City Bay. The bay and harbor at Crescent City are shown on the second map following this page. This bay

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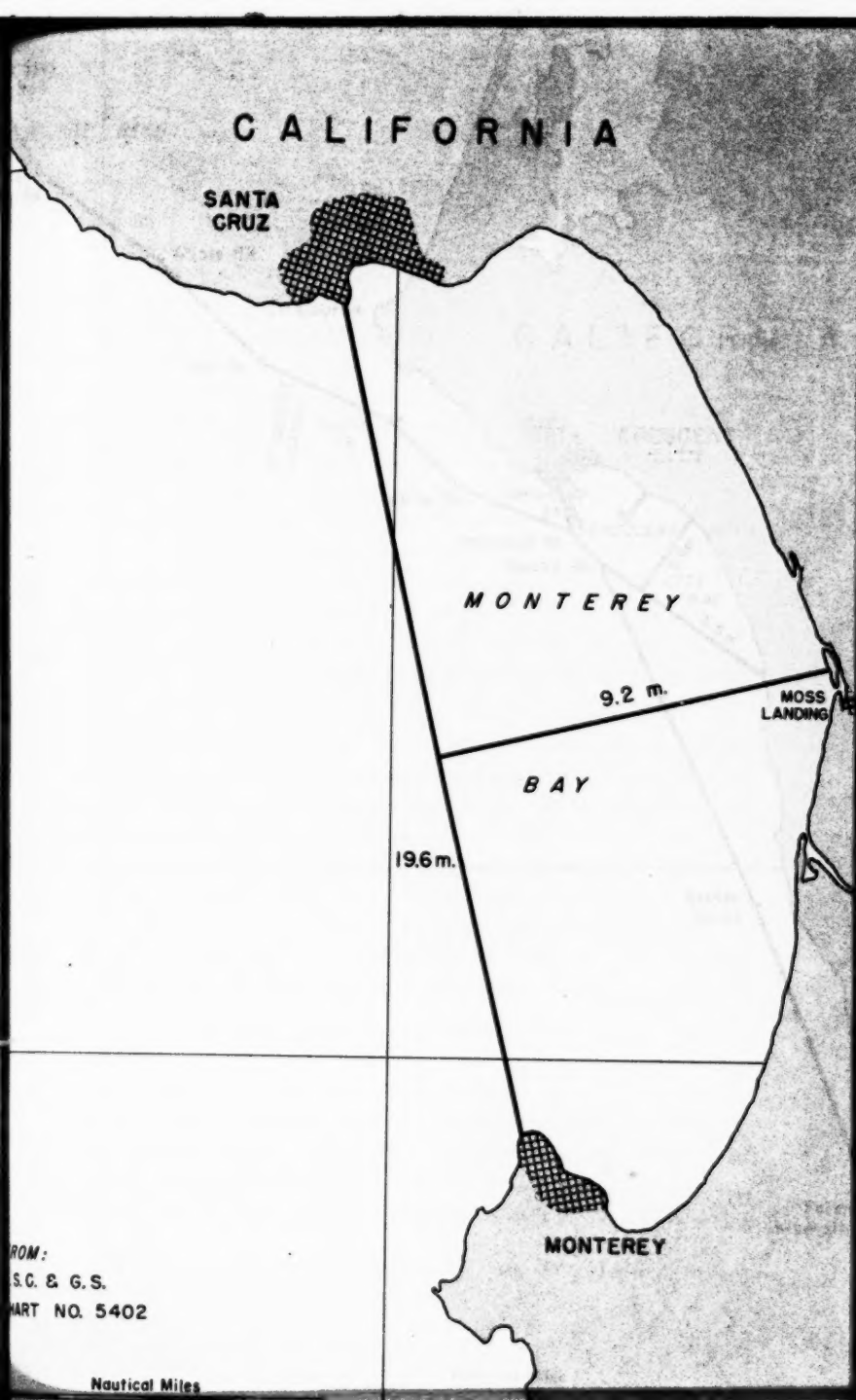
[5] *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235; 252 Pac. 722.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SANTA CRUZ
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BAY
19.6 m.
MONTEREY
ROM:
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ART NO. 5402
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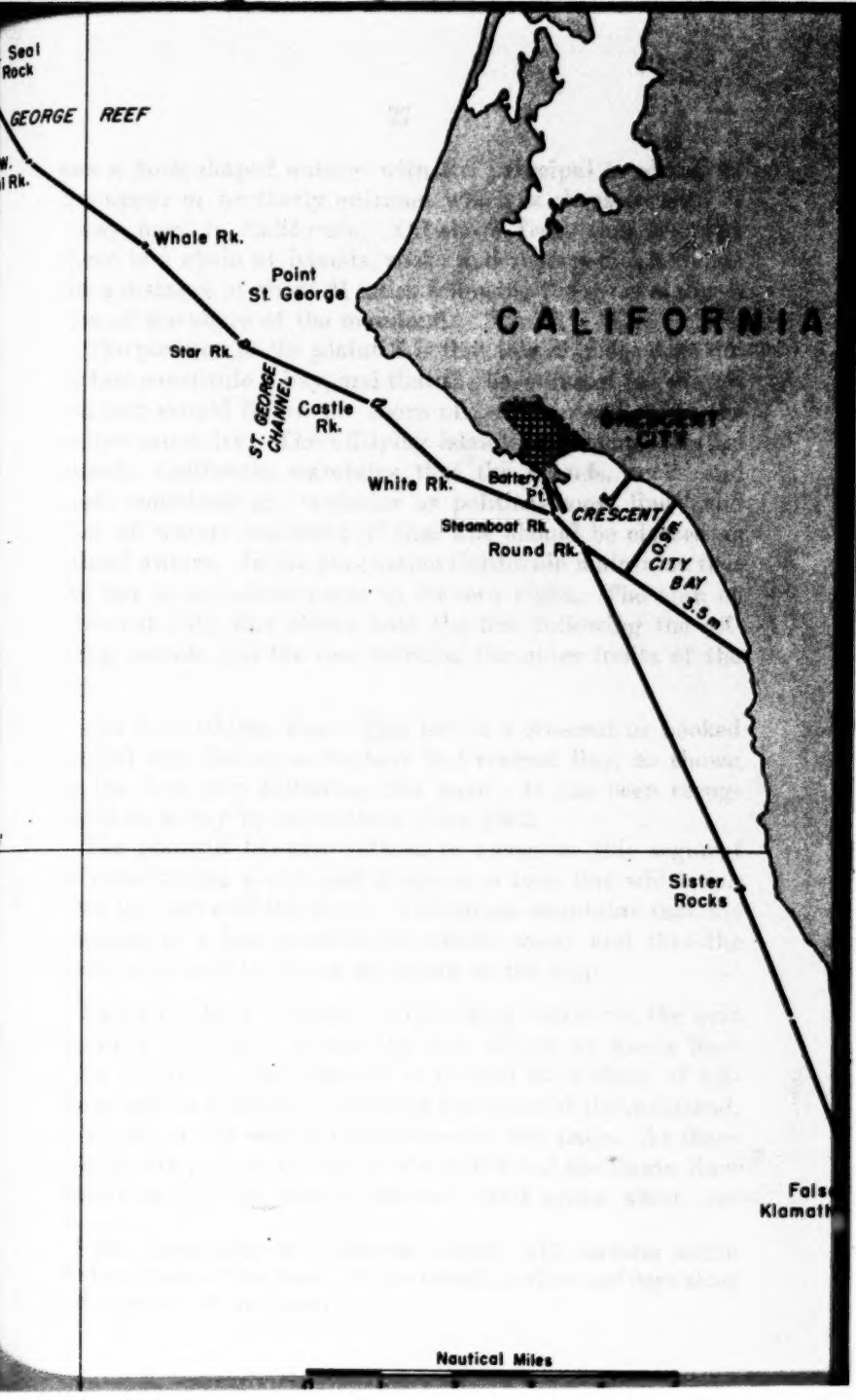

Seal Rock
GEORGE REEF
Whale Rk.
Point St. George
CALIFORNIA
Star Rk.
ST. GEORGE CHANNEL
Castle Rk.
CRESCENT CITY
White Rk.
Battery Pt.
CRESCENT
Steamboat Rk.
Round Rk.
CITY
BAY
3.5m
Sister Rocks
Nautical Miles

has a hook-shaped outline with the principal headland at the upper or northerly entrance which is characteristic of many bays in California. Off-shore from this segment there is a chain of islands, rocks and reefs which extends for a distance of about 21 miles following the general direction of the shore of the mainland.

The position of the plaintiff is that this segment does not in fact constitute a bay, and that the base line of the marginal belt should follow the shore of the mainland along the entire concavity. The off-lying islands are completely ignored. California maintains that the islands, rocks and reefs constitute an "exterior or political coast line" and that all waters landward of that line should be classed as inland waters. In the alternative California maintains that the bay is an inland water in its own right. The map of Crescent City Bay shows both the line following the off-lying islands and the line marking the outer limits of the bay.

San Luis Obispo Bay. This bay is a crescent or hooked shaped bay similar in contour to Crescent Bay, as shown on the first map following this page. It has been recognized as a bay by navigators since 1602.

The plaintiff likewise refuses to recognize this segment as constituting a bay, and proposes a base line which follows the curve of the shore. California maintains that the segment is a bay constituting inland water and that the baseline should be drawn as shown on the map.

Santa Barbara Channel. Proceeding southerly, the next segment in issue is within the area known as Santa Barbara Channel. This channel is formed by a chain of off-lying islands roughly paralleling the shore of the mainland, as shown on the second map following this page. As these islands are part of the State of California,[6] the Santa Barbara Channel lies wholly between land areas which are

[6] The Constitution of California, Article XII, includes within the boundaries of the State "all the islands, harbors and bays along and adjacent to the coast."

within that State. This channel has been recognized and used as an inland protected passage, principally for coastwise and local traffic, since the earliest known times.

The position of the United States is that these islands and this channel must be entirely ignored in fixing the outer limits of inland waters, and that the baseline of the marginal belt should follow the sinuosities of the shore line from Point Conception to Point Hueneme. Plaintiff's counsel recognize that each island may have its own marginal belt. Since the islands are more than six miles distant from the shore line, Plaintiff's proposal would leave a strip of high seas between the three-mile belt along the shore line and the three-mile belt around the islands.

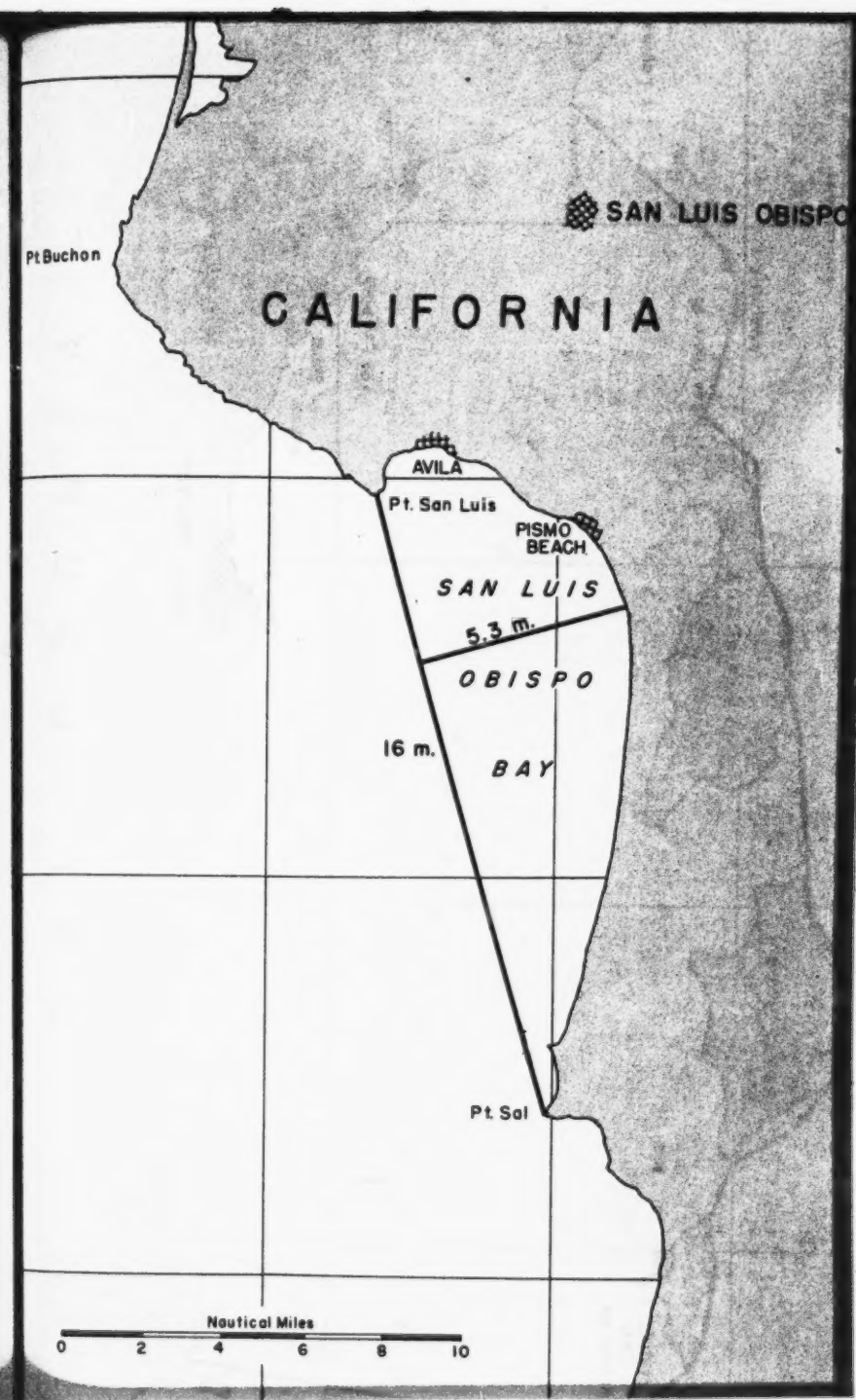
California's position is that these islands should be treated as forming the exterior or political coast line of the United States and that the baseline of the marginal belt should be drawn from the mainland around the outer edge of the islands.

Santa Monica Bay. The next segment is the bay of Santa Monica, shown on the third map following this page. This is an extremely important bay for the purposes of fishing, small commercial navigation, and pleasure boating. It has been recognized as a bay since 1542.[7]

The position of the United States is that no part of this segment constitutes a bay. California maintains that the entire bay is an inland water, whose seaward limit is the line connecting Pt. Dume and Pt. Vicente. California further claims that Santa Monica Bay, besides being an inland water in its own right, is included within the over-all unit area of inland waters above mentioned.

San Pedro Bay. San Pedro Bay is another of the crescent or hook-shaped bays similar in contour to San Luis Obispo and Crescent City Bays. The harbors of Los Angeles and Long Beach lie within this bay, and from the

[7] *People* v. *Stralla*, 14 Cal. 2d 617; 96 Pac. 2d 941.


SAN LUIS OBISPO
Pt Buchon
CALIFORNIA
AVILA
Pt. San Luis
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SAN LUIS
5.3 m.
OBISPO
16 m.
BAY
Pt. Sal
Nautical Miles
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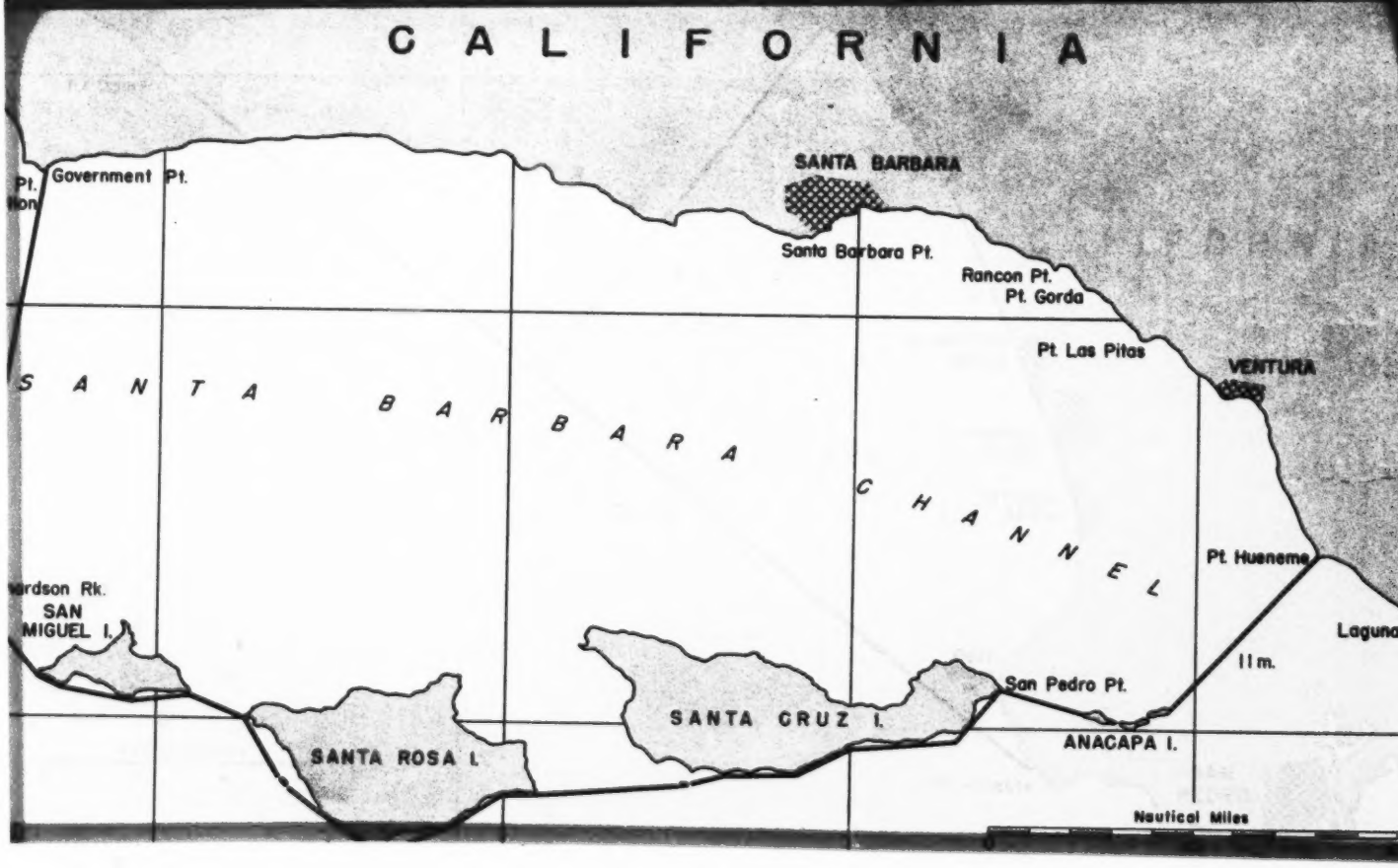
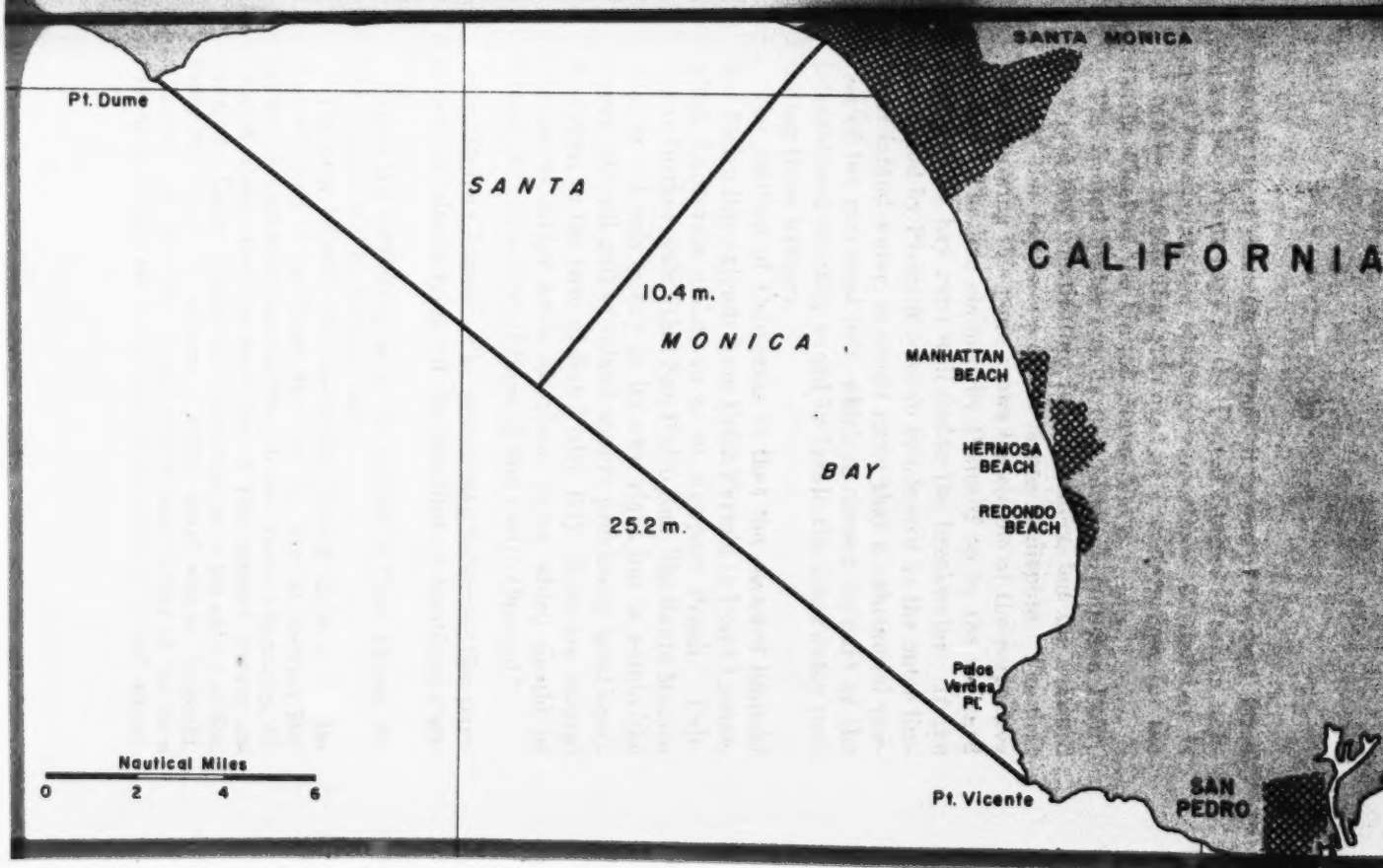

CALIFORNIA
Government Pt.
SANTA BARBARA
Santa Barbara Pt.
Rancon Pt.
Pt. Gorda
Pt. Las Pitas
VENTURA
SANTA BARBARA CHANNEL
Pt. Hueneme
SAN MIGUEL I.
SANTA ROSA I.
SANTA CRUZ I.
San Pedro Pt.
ANACAPA I.
11 m.
Nautical Miles


SANTA MONICA
Pt. Dume
SANTA
CALIFORNIA
10.4 m.
MONICA
MANHATTAN BEACH
HERMOSA BEACH
BAY
REDONDO BEACH
25.2 m.
Palos Verdes Pt.
Nautical Miles
0 2 4 6
Pt. Vicente
SAN PEDRO

standpoint of commercial traffic it is one of the half dozen most important bays in the United States. From a military standpoint, the strategic importance of this bay is shown by the fact that it is used as a western base for the Pacific Fleet of the United States Navy.

The United States admits that some part of San Pedro Bay is a bay constituting inland waters, but the seaward limit of this bay is one of the issues in dispute. The first map following this page shows the claims of the respective parties. The line claimed by Plaintiff to be the seaward limit of this bay runs well inside the breakwater. If the line urged by Plaintiff were to be adopted as the outer limits of inland water, it would mean that a substantial portion of the marginal belt, which is classed as part of the international domain, would be inside the breakwater protecting these harbors.

The position of California is that the seaward limit of San Pedro Bay extends from Point Fermin to Point Lasuen, which California claims to be at Newport Beach.[8] California further claims that San Pedro Bay, like Santa Monica Bay, is not only a bay in its own right but is within the larger over-all unit of inland waters previously mentioned. However, in the case of San Pedro Bay, there are several alternative larger units of inland water which should be considered. The first of these is San Pedro Channel.[9]

San Pedro Channel. The second map following this page shows the islands lying off the coastline of Southern Cali-

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[8] There is a controversy as to the location of Point Lasuen, details of which will be discussed later.

[9] The area between the line which plaintiff urges to be the Southern limit of San Pedro Bay and the jetty at Newport Bay has been designated as segment No. 3 in the Master's Report, p. 42. Plaintiff claims that the base line of this segment follows the shoreline. Under California's contention as to the extent of San Pedro Bay, all of this segment is within inland waters. It would, of course, also be within inland waters under either of the lines claimed by California in the alternative units of inland waters.

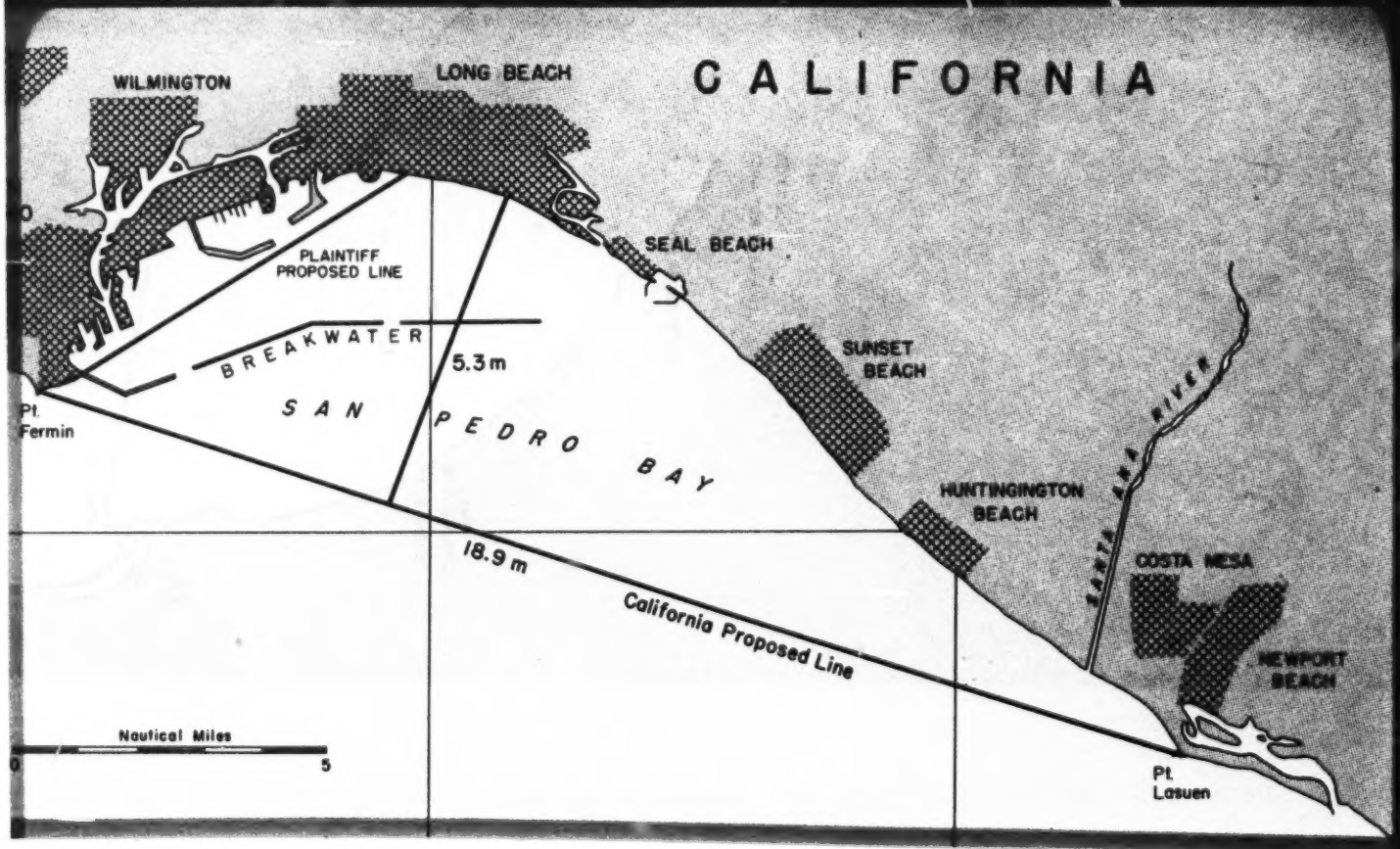
fornia. The body of water lying between Santa Catalina Island and San Pedro Bay is San Pedro Channel. This channel, as is the case with Santa Barbara Channel, has long been recognized and used as a sheltered inner passage along this important strip of California shoreline.

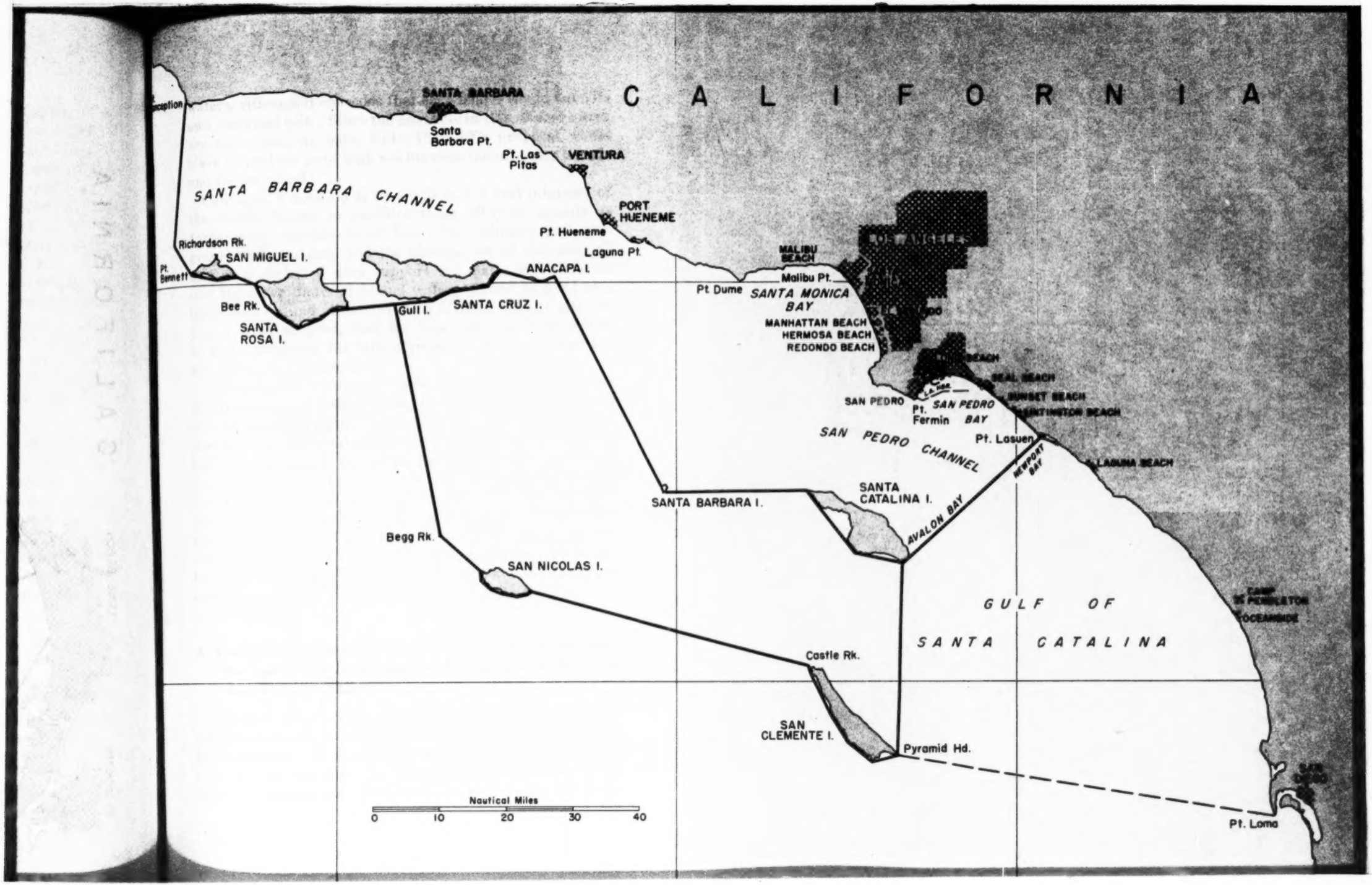
The position of Plaintiff is that this channel and the Island of Catalina are to be completely ignored in determining the outer limit of inland waters, although it concedes that the Island would have its own marginal belt. Since the channel is more than six miles wide, this would leave a strip of high seas between the mainland and the island. California's positon is that this channel, because of its historic use and occupancy, the great extent of shelter which it provides for inland water navigation, and its military importance in relation to the harbors of Los Angeles and Long Beach, constitutes and should be determined to be inland waters of California.

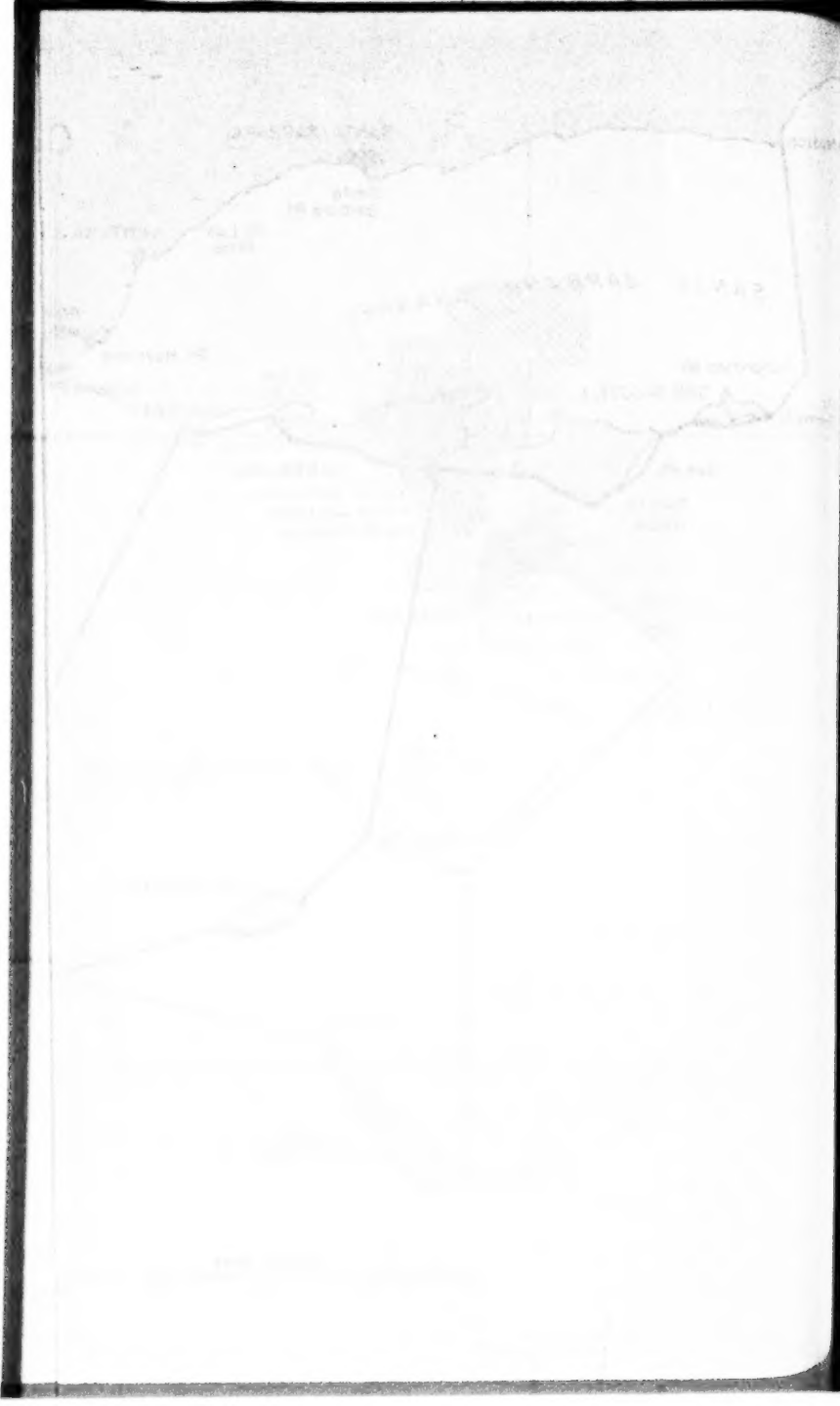
First Alternative Unit Area of Inland Waters. There are a number of other islands lying off the shore which should be taken into consideration in determining the outer limits of inland waters. The first alternative unit area of inland waters is shown on the second map following this page by a solid line running around the islands forming San Pedro and Santa Barbara channels. These channels in fact constitute a continuous inland passage which has long been used and recognized and which should be declared to be one unit area of inland waters.

The Over-All Unit Area of Inland Waters. We come now to the over-all unit of inland waters claimed by California. This over-all unit is formed by a line running around all of the islands in the offshore group. (See outer solid line on the second map following this page.) All of the islands are a part of the counties, townships and school districts of California and are vitally important factors in determining the outer limits of inland waters.

The position of Plaintiff is that all the offshore islands should be ignored in determining the outer limits of inland


CALIFORNIA
WILMINGTON
LONG BEACH
SEAL BEACH
PLAINTIFF
PROPOSED LINE
BREAKWATER
5.3m
SUNSET
BEACH
Pt.
Fermin
SAN PEDRO BAY
HUNTINGINGTON
BEACH
SANTA ANA RIVER
COSTA MESA
NEWPORT
BEACH
18.9 m
California Proposed Line
Nautical Miles
0
5
Pt.
Lasuen


CALIFORNIA
SANTA BARBARA
Santa Barbara Pt.
Pt. Las Pitas
VENTURA
PORT HUENEME
Pt. Hueneme
Laguna Pt.
SANTA BARBARA CHANNEL
Richardson Rk.
SAN MIGUEL I.
Pt. Bennett
ANACAPA I.
MALIBU BEACH
Malibu Pt.
Pt Dume
SANTA MONICA BAY
Bee Rk.
Gull I.
SANTA CRUZ I.
SANTA ROSA I.
MANHATTAN BEACH
HERMOSA BEACH
REDONDO BEACH
SEAL BEACH
SUNSET BEACH
HUNTINGTON BEACH
SAN PEDRO
Pt. Fermin
SAN PEDRO BAY
SAN PEDRO CHANNEL
Pt. Lasuen
NEWPORT BAY
LAGUNA BEACH
SANTA BARBARA I.
SANTA CATALINA I.
AVALON BAY
Begg Rk.
SAN NICOLAS I.
GULF OF SANTA CATALINA
Castle Rk.
SAN CLEMENTE I.
Pyramid Hd.
Nautical Miles
0
10
20
30
40
Pt. Loma



waters, although it concedes that each island would have its own marginal belt. Since the channels in this offshore area are more than six miles wide, Plaintiff's proposal would leave several strips of high sea between the off-lying islands and the mainland.

California's position is that it is in the best interests of the United States to consider these off-lying islands as forming its exterior coast line. The military and geographical importance and the historic use of this over-all unit as a sheltered area support the claim of California that the outer limits of inland waters should be fixed at a line drawn around all the off-lying islands. If any alternative is to be adopted, then the base line should be drawn so as to recognize the inland passages in Santa Barbara and San Pedro channels.

The foregoing summary, together with the maps, shows the character of the water areas involved in this proceeding and the opposing claims of the parties. This bring us to a discussion of the problems involved in locating the seaward limit of our inland waters in the areas above described. In considering this problem, it is important to keep in mind that this seaward limit of these inland waters is the base line or landward boundary of the marginal belt, and that the location of this base line automatically determines the political frontier of continental United States. When the base line is drawn in this case, the seaward limits of our national sovereignty will have been fixed for the first time in our history.

A. Plaintiff's Proposal for the Determination of the Base-line has Never Been Adopted by the United States or Any Foreign Nation.

Although the position of the plaintiff with respect to specific segments has been set forth above, it will be useful to consider the general formula or theory which is the basis of that position. On issue number 1 relating to the status of channels or other water areas between the main-

land and offshore islands, the position of counsel for plaintiff is that the marginal belt must be measured from the shore of the mainland and that none of the channels or other water areas are inland waters.

On issue number 2 concerning whether particular segments are in fact bays or harbors constituting inland water, the position of counsel for plaintiff is that the following formula should be applied to determine whether the segment constitutes inland water or marginal sea:[10]

> "For indentations having pronounced headlands no more than ten nautical miles apart a straight line shall be drawn across the entrance; the envelope of all arcs of circles having a radius equal to one-fourth the length of the straight line shall then be drawn from all points around the shore of the indentation; if the area enclosed by a straight line across the entrance and the envelope of the arcs of the circles is greater than that of a semicircle with a diameter equal to one-half the length of the line across the entrance, the waters of the indentation shall be regarded as inland waters; if otherwise, the waters of the indentation shall be regarded as open sea.
>
> "Where the headlands are more than ten nautical miles apart, the line shall be drawn across the indentation through the point nearest the entrance at which the width does not exceed ten miles, and the same procedure shall be employed to determine the status of the waters inside that line (A/15)."

It will be illuminating to consider the origin of Plaintiff's present proposal that in determining the limits of inland waters, offshore islands and channels should *always* be ignored and bays and harbors tested by this rigid mathematical formula. This proposal apparently was first advanced

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[10] Plaintiff concedes that allowances may have to be made for "existing agreements and 'historic' situations" with respect to bays and harbors, but contends that the burden of establishing such exceptions should be on California. California will presently accept this burden and will demonstrate that the five bays, in addition to being bays in every other sense of the word, do constitute "historic bays."

by the United States delegation at The Hague Conference of 1930. That delegation had gone to the Conference without any written instructions and with the understanding that they were not to sign any conventions.[11] The delegation submitted the proposal as a "first attempt" to "be studied objectively" and used "in the interest of finding a formulae."[12] Other nations also made proposals.[13]

The American proposal was never adopted or approved by the Conference or any Committee or Subcommittee thereof. Although the American proposal along with the French counter proposal was printed in an appendix to the report of a sub-committee, the sub-committee stated that it "gave no opinion regarding these systems, desiring to reserve the possibility of considering other systems or modifications of either of the above systems."[14] On April 6, 1930, the Chairman of the American delegation informed the State Department that "in territorial waters there appears no possibility of agreement, with views more openly divergent that they were when discussions commenced."[15] Moreover, Mr. S. W. Boggs, principal author of the American proposals at The Hague, characterized the so-called American proposal as a tentative "first attempt." (24 A.J.I.L. 541, 555 (1930))

At the time this proposal was suggested at The Hague, it did not represent the considered views of the United States. It was not and did not purport to be based on either national or international practice. The fact is that the proposal was offered as a trial balloon for the purposes of discussion.

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[11] United States Foreign Relations, 1930, I, pp. 208-9.

[12] League of Nations Document C. 351 (b). M. 145 (b). 1930. V., P. 195-117.

[13] Idem, p. 195.

[14] League of Nations Document, C. 230. M. 117. 1930 V., p. 12.

[15] United States Foreign Relations, 1930, I, p. 213.

Nothing has happened since 1930 which would justify Counsel for Plaintiff in elevating this trial balloon to the status of "the American method" or a "development of international law." Many nations have taken action with regard to the location of their marginal belt since 1930. But in no instance has the proposal of the American delegation in 1930 been adopted. Indeed, as late as 1948, Sir Eric Beckett, Legal Adviser to the British Foreign Office, described the work of the Hague Conference of 1930 as follows:

> "What in fact is the status of the so-called 'draft convention' of the Hague Conference? So far from being a convention, it was not even an agreed draft. It was a document prepared by a sub-committee of the conference which neither the Second Committee nor the conference itself approved as a draft convention. The Second Committee, owing to pressure of time, was only able to give hurried consideration to the work of its sub-committee, and, without accepting the draft as a formally agreed draft, merely approved that it should be allowed to be transmitted to any future conference as a basis for further study."

B. Plaintiff's Proposal is a One-Dimensional Approach Which Fails to Take Account of Factors Relating to National Security, Economic Requirements, International Practices, Geography, Law Enforcement and Historical Usage.

The fact that no nation has adopted the theoretical proposal made by the American delegation in 1930 strongly suggests that it has serious practical shortcomings. Further consideration of the proposal emphatically confirms this suggestion.

Plaintiff's proposal to determine the outer limits of inland waters solely on the basis of a mathematical formula is fundamentally inadequate because it seeks to apply a one-dimensional approach to a problem which requires the consideration of a great number of factors. No two seg-

ments of coastline any place in the world present exactly the same problems even though they may have similar physical characteristics. With much accuracy, a geographer has said that the use of arcs of small circles to determine boundaries "indicates a state of mind in which the map—the symbol—dominates the earth—the reality."[16] The dynamic, differing nature of our various coastal areas was succintly stated by the Supreme Court in an opinion by Justice Cardozo: "Bays and rivers are more than geometrical divisions. They are arteries of trade and travel."[17]

The futility of trying to frame in abstract terms a universal solution for all varieties of situations is made strikingly clear by the award of the distinguished tribunal in the North Atlantic Coast Fisheries Arbitration.[18] Question 5 taken up by the Tribunal was the interpretation of the terms "bays, creeks, and harbours" in the Treaty of 1818 between United States and England. The Tribunal said,

> ". . . Conditions of national and territorial integrity of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coastline. This interest varies, speaking generally, in proportion to the penetration inland of the

[16] S. B. Jones, *Boundary-Making* (1945), p. 158.

[17] *New Jersey* v. *Delaware*, 291 U. S. 361, 380 (1934).

[18] The Arbitration was held at The Hague in 1910. The five members of the Tribunal who were selected from the list of the members of the Permanent Court at The Hague were: Dr. H. Lammasch, Professor of the University of Vienna and member of the Upper House of the Austrian Parliament; Jonkheer A. F. de S. Lohman, Minister of State of Netherlands; George Gray, United States Court of Appeals judge; Sir Charles Fitzpatrick, Chief Justice of Canada; and Mr. Luis Maria Drago, former Argentine Minister of Foreign Affairs. Forty sessions amounting to more than 160 hours were consumed in oral argument. Counsel for the United States were George Turner, Charles B. Warren, Samuel J. Elder, and Elihu Root. The published proceedings ran to 12 volumes.

bay; but . . . no principle of international law recognizes any specific relation between the concavity of the bay and the requirements for the control of the territorial sovereign." (1 North Atlantic Coast Fisheries Arbitration, p. 94)

This statement emphasizes the fact that whether a particular body of water is a bay constituting inland waters must be determined on the basis of the conditions,—geographical, military and economic—which exist in any particular case. The Tribunal's statement that no principle of international law recognizes any specified relation between the concavity of a bay and the requirements for control by the territorial sovereign is a direct repudiation of the American proposal which endeavors to establish as an unvarying rule a definite relation between the concavity of the indentation in question and its status as inland waters. The legal and political status of a bay does not depend upon whether the area between a certain set of arcs of circles and a line drawn across the entrance is greater than the area within a semicircle with a diameter one-half the length of the line across the entrance. The special characteristics and problems of these water areas do not lend themselves readily to the arbitrary application of slide rule techniques.

In summing up its discussion of what constitutes a bay, the famous Tribunal used language which is directly applicable to the issues now before the Court:

> "The interpretation must take into account all the individual circumstances which, for any one of the different bays, are to be appreciated; the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general." North Atlantic Coast Fisheries Arbitration, Vol. 1, p. 97.

C. Consideration of the Relevant Factors Demonstrate that the Bays, Harbors, and Channels Under Consideration Are and Should Be Declared to be Inland Waters.

The factors which are ignored in Plaintiff's proposal but which must be taken into consideration in determining the base line fall into six categories. (1) national security, (2) economic requirements, (3) international practices, (4) geography, (5) law enforcement, and (6) historical usage. An analysis of these factors will demonstrate that the base line must be fixed in each segment in accordance with the position taken by California.

1. National Security.

The Supreme Court recognized the close relationship between the marginal belt and our national security by pointing out that it was a "protective belt" which will be of "crucial importance should it ever again become impossible to preserve that peace." (332 U. S. at 35.) As this statement by the Supreme Court indicates, the military advantage or disadvantage of any of the suggested locations of the marginal belt is a matter of the highest importance to our national security.

The strategic importance of the California coastal areas is amply demonstrated by mentioning a few of the many military installations which dot the shoreline and the offlying islands of the area in issue here. San Clemente Island has been completely taken over by the Navy and civilians are not permitted to enter. (Summary of Testimony of Typical Witnesses, p. 120.) Defense installations have been made on San Miguel and Santa Rosa Islands in the Santa Barbara Channel. (Summary of Testimony of Typical Witnesses, p. 212.) A substantial part of the facilities on Catalina Island were taken over for defense purposes during World War II.

These islands guard a chain of Army, Navy, and Air Corps bases on the shore of the mainland. Shoreward from

the Santa Barbara Channel lies Point Mugu, an important guided missile installation, and Point Hueneme, which has been tremendously expanded as a Navy base in recent years. (Summary of Testimony of Typical Witnesses, p. 116.) San Pedro Bay is a western base for the Pacific Fleet of the Navy, as well as being adjacent to the Navy Air Station at Reeves Field and the Army's Fort MacArthur. San Clemente Island protects the approach to the major Navy base at San Diego, the Navy Air Station at North Island and the Marine Base at Camp Pendleton.

The presence of these vital military installations in the coastal areas in issue here make it especially relevant to reiterate that the distribution of rights in the offshore area among various nations will be determined by fixing the outer limits of inland water. As we move seaward through the water areas which our nation may designate as its inland waters and marginal belt to the high sea, the rights and powers of the United States diminish, while conversely, the rights of foreign nations increase. This is strikingly illustrated by the rights of foreign warships and airplanes in the respective zones in the offshore area.

Foreign warships and aircraft are at all times wholly unrestricted in their movement on the high seas. The rights of foreign warships in the marginal belt are at present in doubt, as shown by the fact that the International Court of Justice declined to rule on this point in the *Corfu Channel* case.[19] But in its inland waters, the adjacent nation has exclusive and complete control.

The agency which determines the outer limits of inland waters will thus be doing much more than fixing a theoretical line. It will be determining how near foreign warships and aircraft may lawfully approach our shores and harbor installations. It also will be fixing the location of our neutrality zone, for that has been one of the historic functions of the marginal belt. The sum of the matter is that the

[19] I. C. J. Reports, 1949, p. 4.

fixing of the baseline will determine whether foreign nations are to have rights in the waters surrounding our island military installations and between these installations and our coastal bases *or* whether those waters are to be set aside for the exclusive jurisdiction of the United States.

The military importance of whether the marginal belt is placed close to shore or as far seaward as possible serves to underscore emphatically the argument made in Section I of this brief that the determination of the baseline is a political and not a justiciable question. The military factors in the determination of the outer limits of inland waters call for the opinion and advice of the National Security Council, Secretary of Defense, and the Secretaries of the Army Navy and Air Force. The decision as to the location of the baseline is an element of our national military strategy, and it may involve information as to our national capabilities and aims. It has long been recognized that the courts have neither the responsibility nor the facilities for weighing such information or reaching such decisions.

But, if the Court rejects the argument that the question is beyond the scope of the judicial function, it will be charged with the duty of weighing in this litigation all the interests of the United States in the location of its marginal belt. In doing so, it would seem improper for the Court to rely solely on the viewpoint of the Department of Justice which is engaged in trying to win a lawsuit. If this issue is to be determined in this proceeding, the testimony of the Defense Department and other concerned agencies should be received under circumstances in which it can be examined not only by the Court but also by the parties.

While California makes no pretense of expressing the authoritative military judgment on the location of the marginal belt, it would appear that there are military dangers to placing the belt immediately adjacent to our shores, and on the other hand, military advantages to placing it as far

seaward as possible. It is the belief of California that the protection of our harbors, the security of our military bases on the shore and on the off-shore islands, and the integrity of our inland shipping lanes demand the placement of the marginal belt as far seaward as can be done within the limits of international practice. The military importance of keeping these offshore waters free from hostile forces was reflected in the setting up of Naval defense zones in these areas in World War II. There would appear to be a substantial risk of subverting the best interests of our nation by the adoption of a proposal for the location of the marginal belt, such as that offered by Plaintiff, which completely ignores the significance of the areas to our National security.

The value of a broad belt of inland waters for purposes of defense was stressed in the testimony of Colonel Rufus W. Putnam, submitted to the Master. (Summary of Testimony of Typical Witnesses, pp. 200-201.) In light of the military importance of the off-lying islands and the shoreline bases, Colonel Putnam urged that the baseline should be fixed so as to give the United States complete and exclusive control over the waters lying between such outlying islands and the mainland, and to prevent a belt of high seas from existing in the intervening channels. A realistic example of the military importance of fixing the baseline in accordance with this testimony is provided by the incident in World War II in which a Japanese submarine approached the shore near Goleta in the Santa Barbara Channel and fired shells at oil storage tanks. This was the only instance during the war in which the Continental United States was directly attacked. (Summary of Testimony of Typical Witnesses, p. 212.)

The Corfu Channel Case, recently decided by the International Court of Justice, provides an important lesson as to the military significance of the placement of the marginal belt. In that case it was held that the ships of the British Navy had a right under international law to pass through

the narrow channel between Corfu Island and Albania because it was an international strait. Albania was therefore held liable in damages for the destruction of British ships by mines in the Channel. If Corfu Island had been part of the country of Albania, this channel could have been declared inland waters in which the British ships would have had no right of passage whatever. The United States is more fortunate in that the islands offshore from California do not belong to another nation, but in fact form part of our exterior or political coastline. The United States can make this exterior coastline the baseline of the marginal sea, thus insuring that the channel between the islands and the mainland is inland water and under our exclusive control. It seems entirely probable that such a decision would be much more to our military advantage than to adopt plaintiff's proposal which would leave a strip of high seas in our channels and bays in which foreign warships could pass at any time and over which hostile planes could fly without restriction.

The facts relating to the actual uses of San Pedro and Santa Barbara channels will show that there is heavy and constant traffic of military, commercial and pleasure craft in these relatively narrow channels. These channels frequently have all the appearances of inland lakes. First hand examination is essential to a real understanding of the internal character of these waters. Such an understanding would show the incongruity of the Plaintiff's proposal that these waters be determined to be high seas, open to unrestricted passage of the navies and airplanes of all other nations.

2. Economic Requirements

The one-dimensional approach advanced by Plaintiff completely overlooks the fact that the economic life of an entire coastal community may depend on the proper placement of the marginal belt. The vital stake of the fishing industry in the coastal areas affords an example. San

Pedro Harbor, which is in one of the segments at issue in this proceeding, is the home port of the largest commercial fishing fleet in the world. (Summary of Testimony of Typical Witnesses, p. 300.) The fishing industry is also the largest source of maritime commerce in Crescent City Bay. (Ibid., p. 397.)

To promote the welfare of the large fishing population, it may be desirable or even absolutely necessary for this nation to establish a broad belt of inland waters in which the fishermen of this nation would have exclusive rights. By that step, the water areas of the marginal belt and the high seas, in which foreign nations have rights, would be pushed further seaward. The incidents between fishermen from Japan and our nation in the water of the Pacific Coast prior to World War II is a practical example of the keenness of the competition in these offshore areas, demonstrating the importance of the proper determination of the outer limits of inland waters.

In recent years, many other nations have established a broad belt of inland waters for the purpose of protecting their fishing industries. For instance, in 1951, Ecuador located its marginal belt seaward of "the most advanced points of the Ecuadorian coast and adjacent islands" for the protection of its fisheries. In 1950, Iceland promulgated regulations for the conservation of its fisheries which fixed the outer limits of its inland waters as a "line drawn between the outermost points of the Coast, islands and rocks . . . (or) across the opening of the bay." These are only examples of the many instances in which economic interests such as fisheries have caused other nations to fix their marginal belts as far seaward as possible, thus establishing a broad belt of inland waters.

The importance to the fishing industry of the location of the marginal belt is now or soon may be duplicated with regard to other industries which operate in the offshore area. Scientists and engineers are in agreement that we are only in the first stages of the development of the vast

potential resources of this offshore area. (See Carson, *The Sea Around Us*). The Supreme Court itself noticed that the oil problems in this area arose only during the 1930's. 332 U. S. at 39.

Whether the United States will have exclusive rights to the vital mineral resources in any given area of the offshore area depends on the location of the baseline of the marginal belt. Foreign nations will have no rights whatsoever in the area which is determined to be inland waters. But in the marginal belt, the Supreme Court has said that the oil and other substances and minerals "may well become the subject of international dispute and settlement." (*United States* v. *California*, 332 U.S. 19, 35 (1947); see *United States* v. *Texas*, 339 U.S. 707, 719 (1950). And foreign nations will have still greater rights in the resources in the area of the high seas seaward of the marginal belt.

In view of these facts, it is apparent that the maximum amount of the offshore resources can be encompassed within the exclusive jurisdiction of the United States by fixing the outer limits of inland waters as far seaward as possible. To place the baseline of the marginal sea closer to shore would result in a surrender of some of the resources of the sea which the United States could have claimed. Such a surrender might well be a serious detriment to our economic welfare. A shortage of the raw materials present in the offshore area might also be a handicap to our defense efforts.

The close relation between the location of the marginal belt and our economic security again points up the argument made earlier that the questions involved in this proceeding are beyond the scope of judicial inquiry. Whether the United States should surrender exclusive control over the resources from some of the offshore areas is a question which requires the full consultation with the National Security Resources Board and other interested Governmental agencies. But if the Court should reject the contention that this issue is political and not justiciable, California

believes that it is vital that the Court recognize the necessity of the fixing of the baseline from an economic point of view. It is the earnest belief of California that the best interests of our nation would not be served by adopting Plaintiff's proposal and thus claiming for the exclusive jurisdiction of the United States only a bare minimum of the offshore resources.

3. International Practices

It has already been shown that the marginal belt must be located within the limits of international practice. This is confirmed by the Master's statement that the United States recognizes that a determination of the outer limits of inland waters "presents problems which have international aspects . . ." (p. 8) The practices of other nations have importance in two respects:

(1) In determining for the first time in its history the outer limits of its inland waters, the United States should be guided by the lessons and experience of other maritime nations which have considered this problem over a long period of time.

(2) In determining the location of the seaward limit of inland waters, the United States must consider the range of choice which would be within the limits of international practice and must fix lines on which it would be willing to stand in an international controversy.

For the purposes of showing the range of international practice, California will discuss the general concept of inland waters both as to channels and bays, and will set forth a number of examples of the laws of other nations with illustrative maps showing the application of those laws to their coastal areas.

General Concept of Inland Waters.

To locate the seaward limit of inland waters, it is necessary to distinguish between the "physical coast" of any body of land and the "political coast" of a state or nation. These terms were defined by the United States in the statement of its "Counter Case" in the Alaska Boundary Arbitration, as follows:

> "*physical coast,* the line where water ends and land begins."
>
> "*political coast,* the line adopted in international law as the basis for the extension of municipal jurisdiction over portions of the high seas contiguous to the territory of a nation;" (4 Alaska Boundary Arbitration 31.)

Thus the physical coastline is synonymous with the shore line, whereas the political coastline crosses bays and arms of the sea and extends around islands and is sometimes referred to as the "outer or exterior" coastline.

The principle of the exterior coastline is further explained by the following excerpts from the United States case in the Alaska Boundary controversy:

> "The political coast line (since all arms of the sea not exceeding six miles, *and in some cases more,* in width, and all islands are practically treated as portions of the mainland) extends outside the islands and waters between them." • • •
>
> "It should also be noted that there are no 'inland waters' composed of salt water within the physical coast line, but within the political coast line there are a great number of straits, sounds and inlets, formed by the contour of the continent and the proximity of the islands to it and to one another."

Under the principle of the political or exterior coastline all waters which lie landward of that coastline are inland waters. Therefore, the fixing of the political coastline is

the governing factor in the determination of the seaward limits of both bays and channels. Because it marks the outer limits of inland waters, the political coastline constitutes the baseline of the marginal sea in areas where the mainland does not confront the open sea.[20] In presenting this general concept of inland waters, we will first discuss the application of this exterior coastline principle to channels and other waters which lie between the mainland and the off-lying islands, rocks and reefs.

Channels.

Position of the United States in relation to Cuba. The United States recognized the principle of the exterior or political coastline as early as 1863 in a letter by Secretary of State Seward to the Spanish Minister concerning the territorial waters of Cuba. Secretary Seward's letter was prompted by a dispute between Great Britain and Spain concerning the extent of Cuban inland waters. Cuba was Spanish territory at that time, and Britain protested Spain's claim to the waters between the mainland of Cuba and the off-lying islands. The map following this page shows that there are a large number of islands lying offshore from Cuba, many of them a considerable distance from the mainland, some as many as 70 miles. Secretary of State Seward said in part:

> "The undersigned has further ascertained, as he thinks, that the line of keys which confront other por-

[20] Although the principle of the exterior coast line was ignored by the tentative American proposal at The Hague in 1930, Mr. S. W. Boggs, the principal author of that proposal, has now changed his position. Writing in the April 1951 issue of the American Journal of International Law, Mr. Boggs stated that the marginal belt should be located seaward of off-lying islands, and the example he gives in the article shows that he now believes that islands should be taken into consideration even though they are more than six miles apart. 45 A. J. I. L. 240, 254-255.

HABANA
CUBA
GOLFO DE BATABANO
Cayos de San Felipe
C. Frances
ISLA DE PINOS
BANCO JARDINES
C. Corrientes
Cabo Frances
Cayo Largo
ARCHIPIELAGO DE LOS CANARIOS
Cayo Bretón
Cayo Grande
Cayo Anclitas
Nautical Miles
0
100

> tions of the Cuban coast resemble, in dimensions, constitution and vicinity to the mainland, the keys which lie off the southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the *exterior coast line*, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the *exterior sea front of those keys*" (1 Moore's Digest of International Law, p. 711).

This letter from Secretary Seward shows that the United States recognized the merits of Spain's claim. Shortly thereafter, Britain revised its position and not only accepted the Spanish claim but asserted similar claims concerning the islands and inner waters of the Bermudas, the Bahamas, and Jamaica. (See Opinions of the Law Officers of the Crown, 18 March 1869 and 12 October 1872. Citation of Documents, p. 168.)

The principle that the base line of the marginal belt should coincide with the exterior coastline of off-lying islands has been consistently followed in Cuba up to the present time. In 1901, while Cuba was temporarily under the dominion of the United States, an ordinance was promulgated by the United States Secretary of War Elihu Root which applied the principle of the exterior coastline announced by Secretary Seward. (Citation of Documents, p. 99) This ordinance provided, in part, as follows:

> "The jurisdictional waters of Cuba extend for four leagues from the coast of the island *or from the cays belonging to it.*"

While this ordinance fixes four leagues as the jurisdictional area for customs purposes, the crucial point is that this jurisdictional area is to be measured from a base line drawn outside the outermost islands and rocks.

In January, 1934 a "decree-law" was adopted in Cuba reaffirming in more specific terms the principle that the

waters inside the exterior coastline are inland waters.[21] This "decree-law" reads in part as follows:

> "Article 6.—The territorial waters or maritime frontiers of Cuba extend for six miles from the coast *or from the line of cays which surrounds it.*
>
> "The waters included between the islands, islets or cays and the mainland of the Republic are interior waters and their use for navigation, fishing, and other modes of utilization shall be determined by the laws and rules in force or which may be established." (Citation of Documents, p. 100)

As late as 1938, this law was reenacted, with the addition that the same rule was applied to the airspace over these waters.[22]

These laws furnish a graphic example near at hand of the treatment accorded off-lying islands and intervening channels. It appears that no nation in the world has ever protested Cuba's claim to these bodies of water as inland waters. On the contrary, this claim, and the principle of the exterior coastline upon which it is based, has been widely recognized throughout the world.

In its counter case before the Alaskan Boundary Tribunal, the United States cited the example of Cuba in support of its argument that the seaward limit of inland waters is the political or exterior coast line, as follows:

> "*Distinction Between the Outer and Inner Coast Line.*—An eminent English publicist has said that 'certain physical peculiarities of coasts in various parts of of the world, where land impinges on the sea in an

---

[21] Decree-Law No. 108 of 8 January 1934, concerning the Functions and Reorganization of the Navy. (La Jurisprudencia al Dia, 1934, Section de Legislacion (Habana, 1934), p. 28.)

[22] Code of Social Defense, 1938, Book I, Title 1, Chapter 2, Section 2, Article 7 (D) and (E). (1 J.M. Bustamante y Morejoh and A. Segura Bustamante, Codigo de Defensa Social y su Legislacio'n Penal Complementaria, Publicacion autorizada por el Gobierno (Habana, 1938) p. 11.)

unusual manner, require to be noticed as affecting the territorial boundary. Off the coast of Florida, among the Bahamas, *along the shores of Cuba, and in the Pacific,* are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water. To take a specific case, on the south coast of Cuba the Archipielago de los Canarios stretches from sixty to eighty miles from the mainland to La Isla de Pinos, *its length from the Jardines bank to Cape Frances is over a hundred miles.* * * * In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. *Each must be judged upon its own merits.* But in the instance cited, there can be little doubt that the whole Archipielago de los Canarios is a mere salt-water lake, *and that boundary of the land of Cuba runs along the exterior edge of the banks."* (Citing Hall, Int. Law, p. 129-130) Alaska Boundary Tribunal, Vol. 5, pp. 14 and 15, Senate Document 162, 58th Congress, 2nd Session.)

The fact that the waters off Cuba are comparatively shallow does not detract from the principle of the exterior coastline. The depth of the waters is only one of many factors which must be taken into consideration by a nation in the determination of the limits of its inland waters. *Each case must be judged on its own merits.* As we have pointed out, the weakness of the system proposed by the United States is that it focuses solely on one factor and ignores all other relevant considerations. Indeed, if Plaintiff's proposal were applied to Cuba, the Cuban archipelago would be ignored and the marginal belt would follow the shoreline of the mainland.

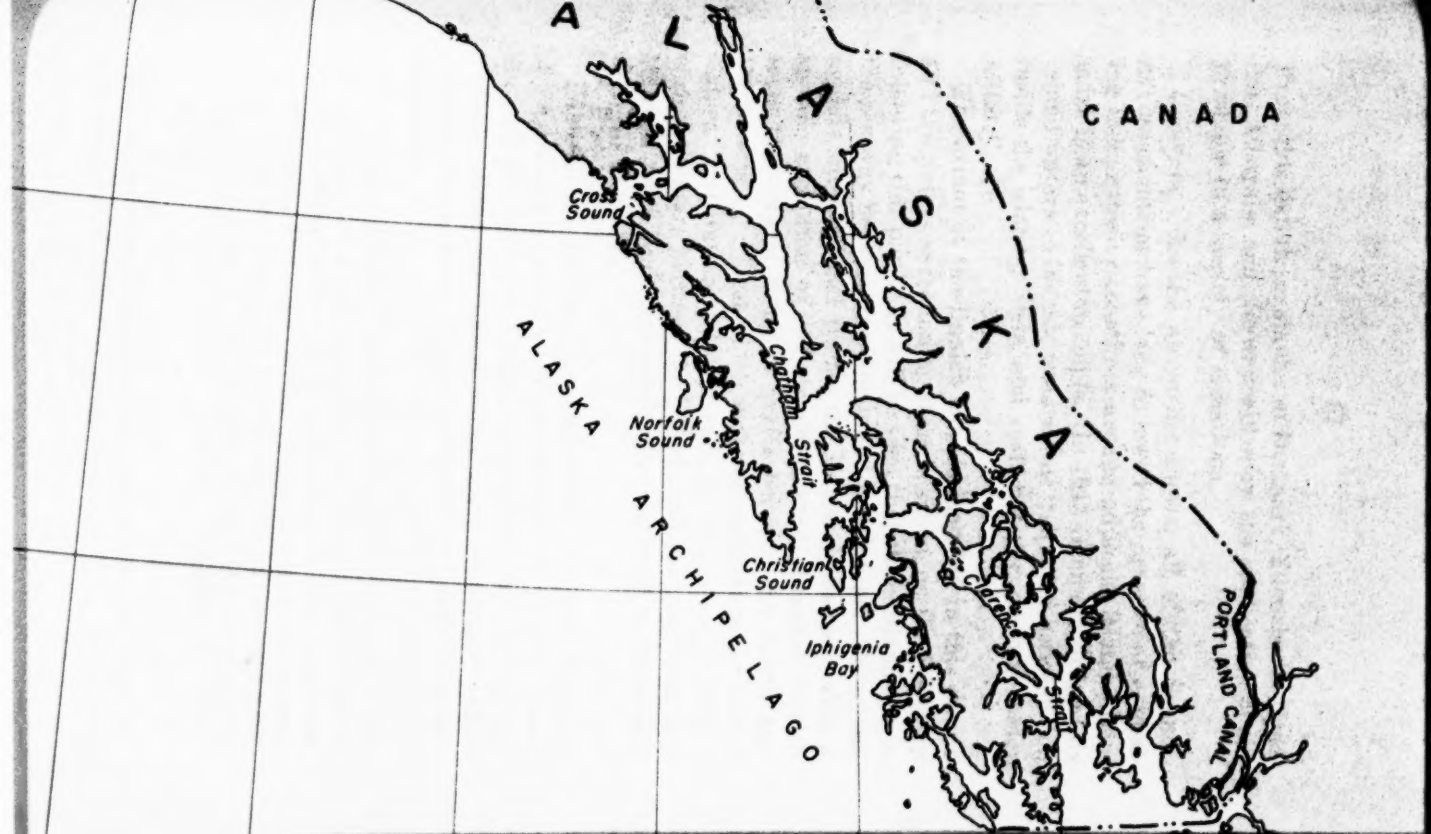
Position of the United States in relation to Alaska. The United States' acceptance of the principle of the exterior coastline is illustrated in the Alaska Boundary Case. A reduction of a U. S. Coast and Geodetic Survey map of the Alaskan Archipelago, which formed one of the exhibits of the United States in that case, is inserted following this page. In describing the seaward boundary in this part of Alaska, Counsel for the United States said,

> "It thus appears that from *the outer coast line* of a maritime state, as defined in physical geography, is invariably measured under international law, the limit of that zone of territorial water generally known as the marine league. The boundary of Alaska, that is, the exterior boundary from which the marine league is measured,—runs along the outer edge of the Alaskan or Alexander Achipelago, embracing a group composed of hundreds of islands." Citing Hall, Int. Law, pp. 129-130) (Pp. 14-15, Italics in the original, Alaska Boundary Tribunal, Vol. 5, pp. 14 and 15, Senate Document 162, 58th Congress, 2d Session).

The map will show that this exterior boundary establishes as inland waters all the straits, bays and channels of the Alaskan Archipelago. It is equally vital that the channels and bays within the exterior coastline of California should be determined to be inland waters.

A great many other nations have recognized the principle that the exterior or political coastline constitutes the baseline of the marginal sea. A partial compilation containing the text of 92 laws of other nations is set forth in the Citation of Documents, pages 12-314. From this it will be seen that among countries which have fixed their baselines along the seaward side of some or all of their off-lying islands, islets, rocks and reefs, are the following:

Australia	Finland	Norway
Canada	France	Russia
Denmark	Hawaii	Saudi-Arabia
Ecuador	Iceland	Sweden
Fiji	Iran	


A L A S K A
CANADA
Cross Sound
Chatham Strait
Norfolk Sound
ALASKA ARCHIPELAGO
Christian Sound
Iphigenia Bay
Clarence Strait
PORTLAND CANAL

From this list, the examples of Denmark, Yugoslavia, Ecuador, Australia and Norway will show the application of the principle in a variety of situations.

Denmark. As the above list shows, all of the Scandinavian countries have long followed the practice of extending their exterior coastlines around adjacent islands. Denmark is an excellent example. In 1913 Denmark defined its inland waters to include waters now "situated between and inside the islands, islets, and reefs not permanently under water."

The extent of the Danish islands included in this decree and the waters surrounding them is shown on the first map following this page. It will be seen that these islands lie in the sea-way between the North and Baltic seas. To accommodate international traffic, the Denmark decree makes a specific exception of certain designated channels "which form the natural route of traffic between the North and Baltic seas . . . [and which are] not included in the inland waters." (Citation of Documents, pp. 110 et seq.) Otherwise the waters between the islands and the main land and between the islands are specifically declared to be inland water of Denmark.

Yugoslavia. In 1948, the Federative People's Republic of Yugoslavia enacted a law establishing its exterior coast line and the base line of the marginal sea as the line extending around all islands within its jurisdiction. After defining this exterior coast line point by point, this law provided:

> "The territorial sea of the Federal People's Republic of Yugoslavia embraces the sea zone in the width of six nautical miles in the direction of the open sea, reckoning from the border of the internal sea waters, or from the line of the lowest ebb-tide on the land coast *or on the coast of the Islands* outside the internal sea waters of the Federal People's Republic of Yugoslavia."

The second map following this page shows the approximate location of this "exterior coastline", as defined by

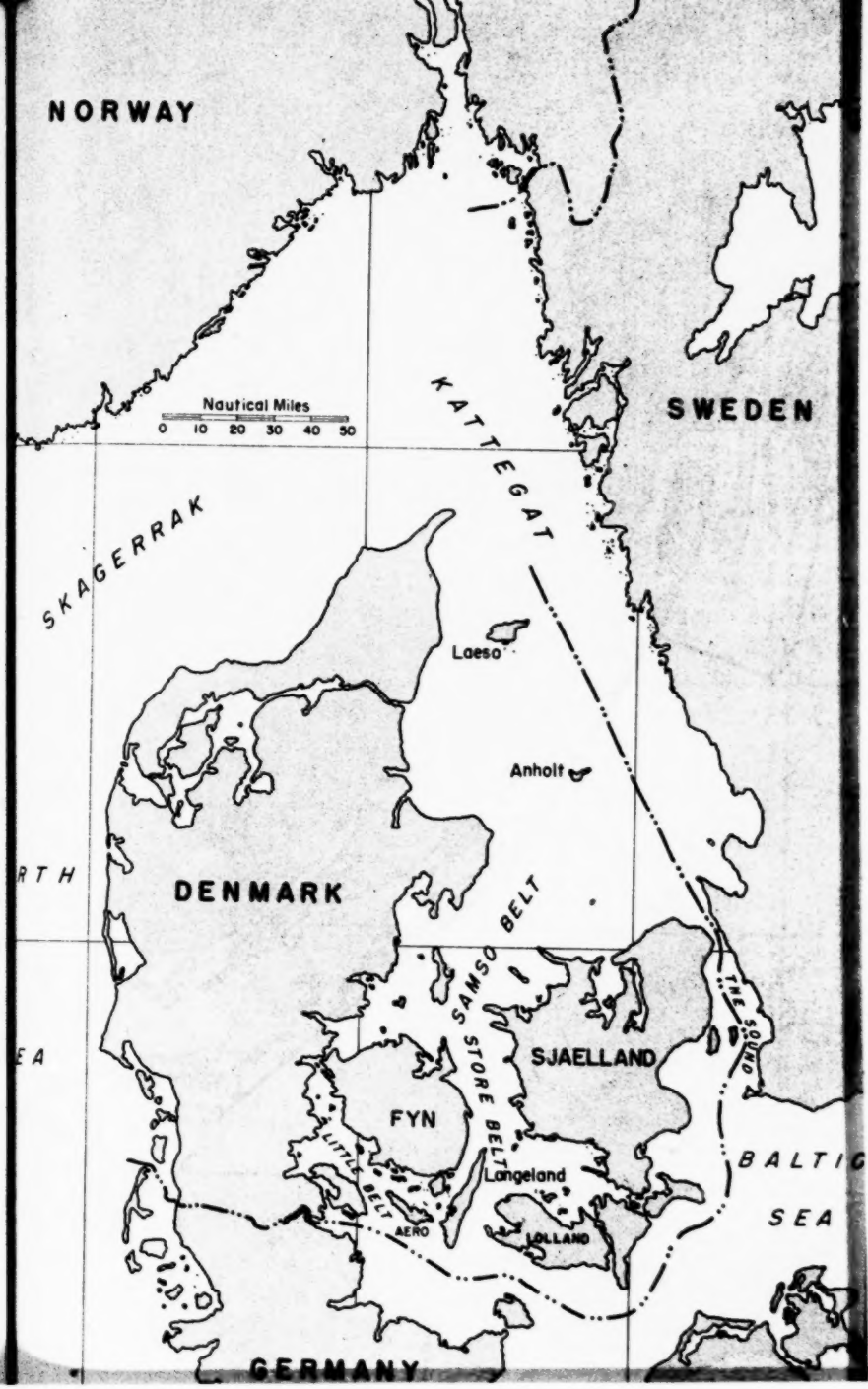
the Yugoslavian statute. (Copy of this statute was received too late to include in the "Citation of Documents.")

Ecuador. An example of the size of water areas which may be included within an exterior coast line is found in the case of the laws of Ecuador regarding the Galapagos (Colon) Islands. In 1938 Ecuador enacted regulations declaring that the marginal belt should be measured from "the lowest low water mark on the most salient points of the outermost Islands which form the outline of the Colon (Archipelago.)" (Citation of Documents, p. 129 et seq.) The above regulations were reenacted with some variations in the form of a "decree-law" on February 22, 1951. (Copy of this decree was received too late to include in the "Citation of Documents.")

The baseline defined in this statute extends across water areas varying in distances from 16 to 76 miles, as shown on the third map following this page. To our knowledge, no nation has protested this claim.

Australia. The application of this exterior coast line principle to a strait or channel lying between a mainland and a single large off-lying island is shown on the map of South Australia, which is the fourth map following this page. The strait and passage shown connect the open waters of the Indian Ocean. The width of this channel is greater than San Pedro or Santa Barbara Channels offshore from California. The large body of water of Investigator Strait, together with the Gulf of St. Vincent, constitute part of the inland waters of South Australia. (Citation of Documents, p. 65b; See Counter Memorial of Norway in Anglo-Norwegian Fisheries case, Par. 380, citing Charteris, Chapters on International Law (1940) p. 99.)

Norway. As early as 1812, Norway established a line drawn around the islands or islets farthest from its mainland as its exterior coastline and as the base line for the measurement of its marginal sea. In a decree dated October 1869, Norway more precisely defined one segment of this


NORWAY
SWEDEN
Nautical Miles
0 10 20 30 40 50
KATTEGAT
SKAGERRAK
Laeso
Anholt
DENMARK
SAMSO BELT
STORE BELT
THE SOUND
SJAELLAND
FYN
LITTLE BELT
AERO
Langeland
LOLLAND
BALTIC SEA
GERMANY

Pt. Kamenjak
Unje Is.
Premuda Is.
Dugi Otok
YUGOSLAVIA
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SEA
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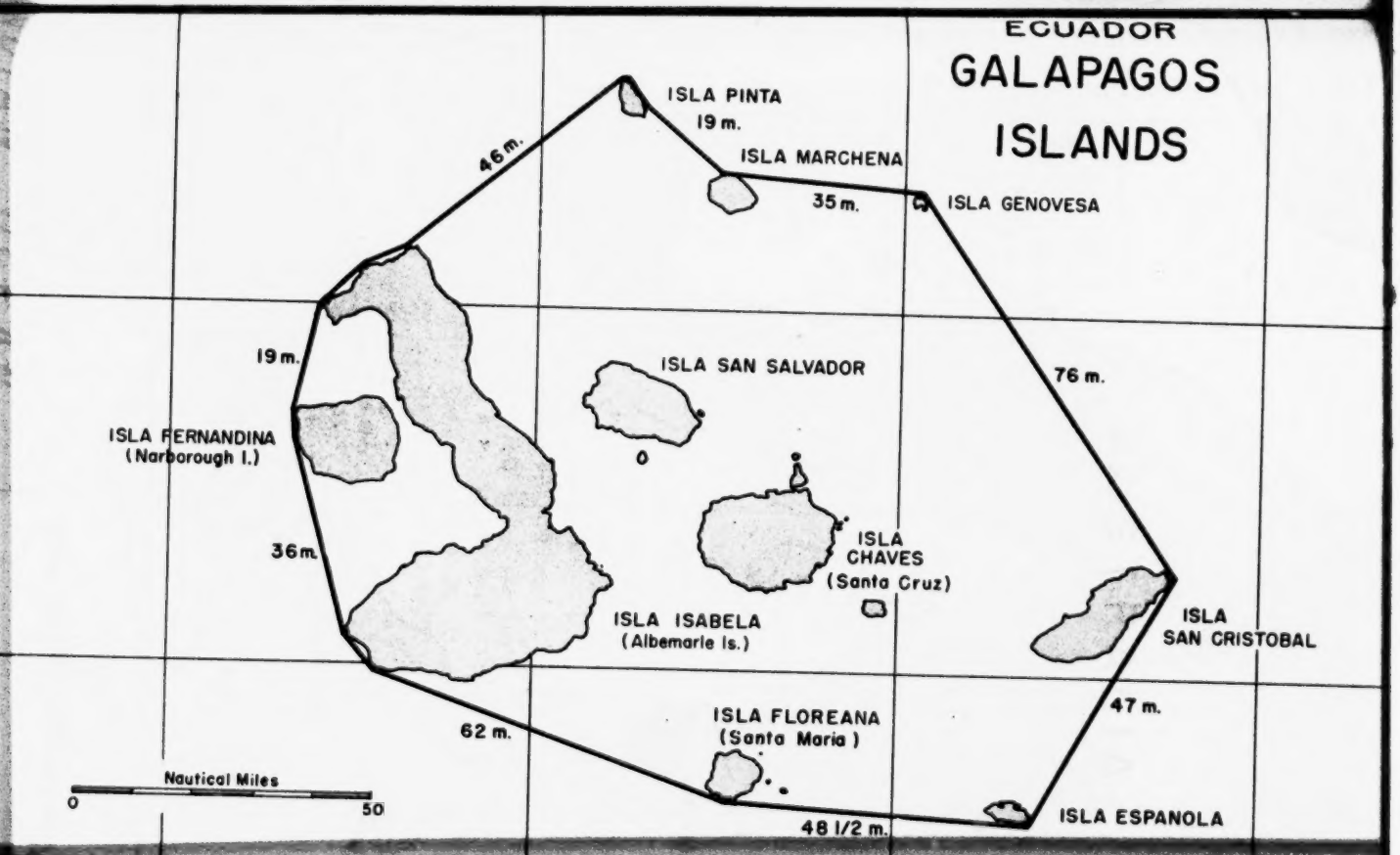
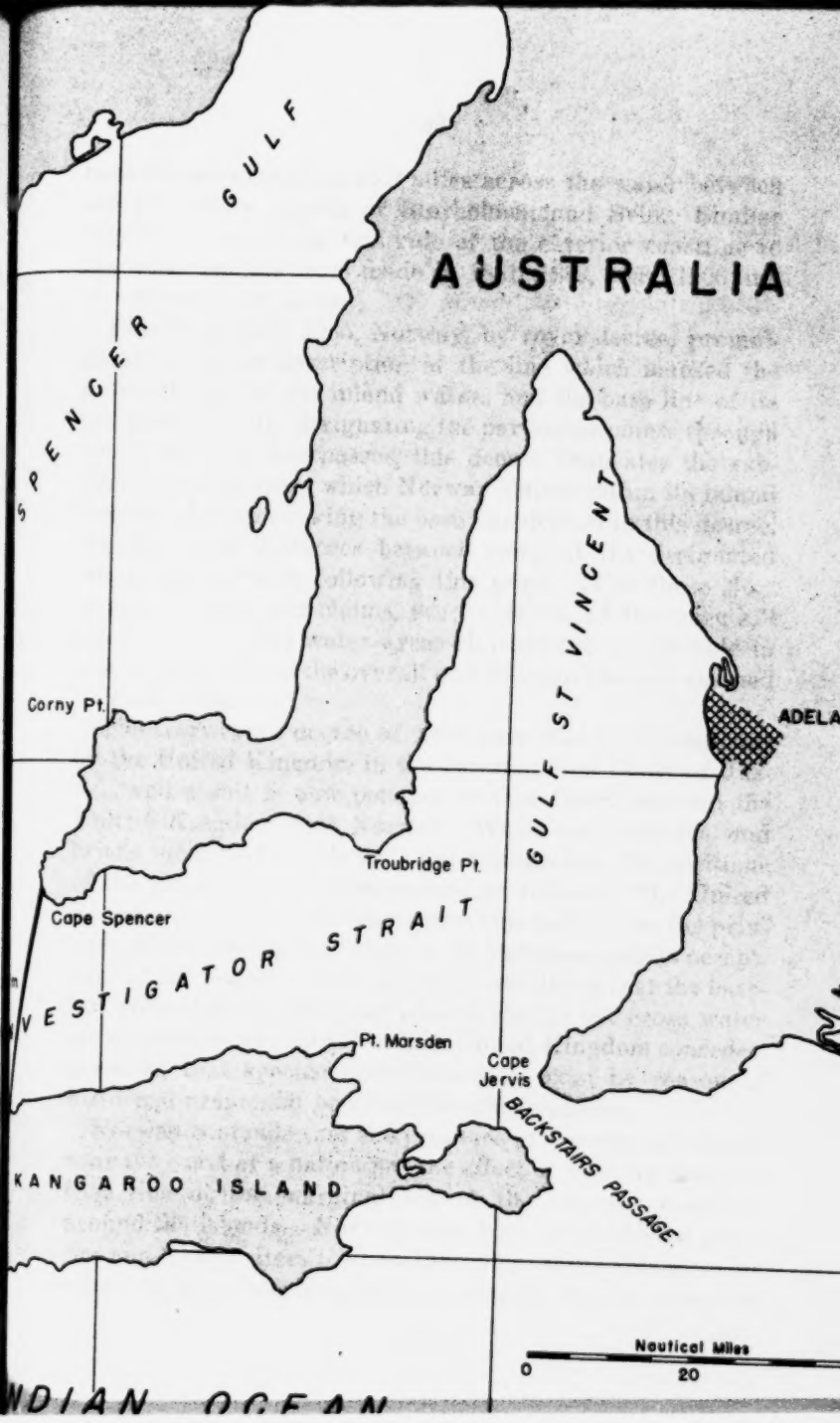
Solta Is.
Hvarski K.
Vis Is.
Korculanski K.
ALY
Nautical Miles


ECUADOR
GALAPAGOS
ISLANDS
ISLA PINTA
19 m.
ISLA MARCHENA
35 m.
ISLA GENOVESA
46 m.
19 m.
ISLA SAN SALVADOR
76 m.
ISLA FERNANDINA
(Narborough I.)
0
ISLA
CHAVES
(Santa Cruz)
36 m.
ISLA ISABELA
(Albemarle Is.)
ISLA
SAN CRISTOBAL
47 m.
ISLA FLOREANA
(Santa Maria)
62 m.
Nautical Miles
0
50
48 1/2 m.
ISLA ESPANOLA


AUSTRALIA
GULF
SPENCER
GULF ST VINCENT
Corny Pt.
ADELA
Troubridge Pt.
Cape Spencer
STRAIT
Pt. Marsden
Cape Jervis
BACKSTAIRS PASSAGE
KANGAROO ISLAND
Nautical Miles
0
20

base line as extending 25.9 miles across the water between the particular islands of Storholmen and Svin. Similar regulations applying this rule of the exterior coastline to the outer islands were made in 1881, 1889, 1896, 1906 and at various later dates.

Finally in July 1935, Norway, by royal decree, promulgated a precise description of the line which marked the seaward limit of the inland waters and the base line of its marginal belt. By designating the particular points through which the base line passes, this decree delineates the substantial water areas which Norway claims within its inland waters. A map showing the base line defined in this decree, together with distances between some of the designated points, is set forth following this page. (For these Norwegian decrees and claims, see "Citation of Documents," pp. 240-266). The water areas claimed are comparable in size to those within the overall unit of inland waters claimed by California.

The Norwegian decree of 1935 gave rise to a complaint by the United Kingdom in the International Court of Justice, and a suit is now pending in that Court between the United Kingdom and Norway. While the evidence and briefs submitted in this case are voluminous, the positions of the parties can be summarized as follows: The United Kingdom, notwithstanding its previous reliance on the principle of the exterior coast line in the Bahamas and its acceptance of the Spanish claim in Cuba, now claims that the baseline following the off-lying islands should not cross water areas greater than 10 miles. The United Kingdom concedes, however, that specific exceptions may exist by reason of historical usage and possibly for other reasons.

Norway contends that the presence of a group of islands near the coast of a nation has the effect of pushing back the base line of the marginal sea to the exterior coastline around the islands. Norway cites both international practice and legal writers to show that it can adopt this exterior coastline as a baseline, without regard for the distances

between the islands and the continent, or between the islands themselves. (Counter-Memorial of Norway, ¶ 442-453) While Norway says that its baseline is justified on the principle of the exterior coastline without reference to historical data, it contends that historical usage would also sustain its position.

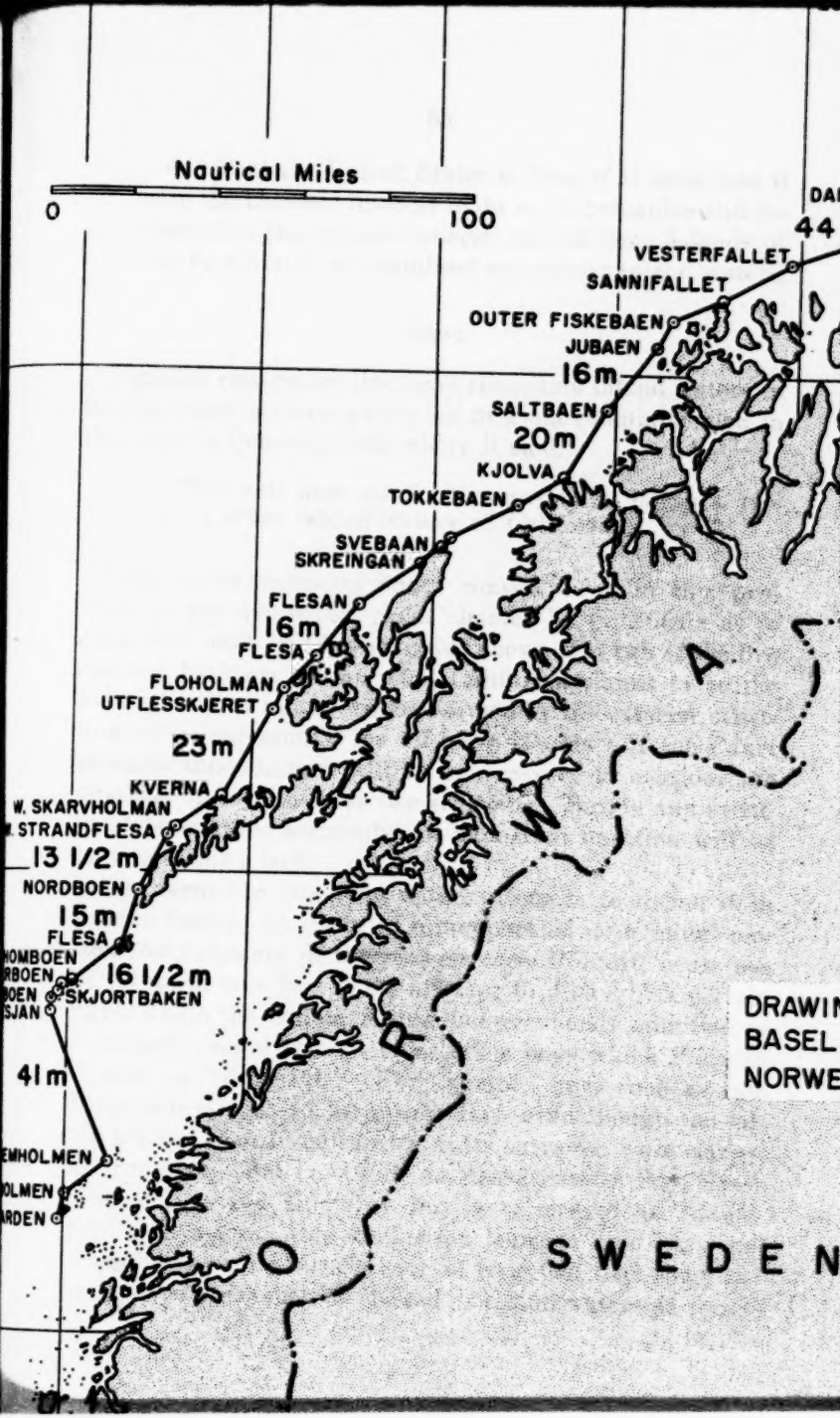
While this Anglo-Norwegian case is an example of the international materials which must be examined by the United States in determining the baseline of its marginal belt, it is clear that there is nothing even in the claim of the United Kingdom which forecloses the United States from giving proper consideration to the islands off the California coast. The fact that the Anglo-Norwegian controversy involves maritime nations which are in close contact on opposite sides of the North Sea sharply distinguishes the problems involved off the coast of California. Considering the strategic location of the islands offshore from California and the historic uses of the Santa Barbara and San Pedro Channels, there is no reason to suppose that any other nation bordering on the Pacific Ocean would find any legitimate objection if these waters were officially declared by law to be what they have always been in practice, namely, inland waters of California.

The foregoing summary of the practice of foreign nations with regard to off-lying islands demonstrates:

1. That many nations have found it advantageous to adopt the exterior coastline extending around off-lying islands as the base line for their marginal sea;

2. That the system of the exterior or political coast line contravenes no principle of international law;

3. That the use of the exterior coast line as a base line for the marginal sea does not depend on any arbitrary or limited distance that such a line may extend across a water area. The line in each case is a political line based upon laws or decrees of a sovereign state and not upon any arbitrary limitation of distance;


Nautical Miles
0
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VESTERFALLET
SANNIFALLET
OUTER FISKEBAEN
JUBAEN
16m
SALTBAEN
20m
KJOLVA
TOKKEBAEN
SVEBAAN
SKREINGAN
FLESAN
16m
FLESA
FLOHOLMAN
UTFLESSKJERET
23m
KVERNA
W. SKARVHOLMAN
W. STRANDFLESA
13 1/2 m
NORDBOEN
15m
FLESA
16 1/2 m
SKJORTBAKEN
41m
SWEDEN

SHOWING APPROXIMATE
E ESTABLISHED BY
IAN DECREE OF 1935

4. That the United States is free, if it finds that it is in the national interest to do so, to recognize and declare that the waters between the off-lying islands of California and the mainland are wholly inland waters.

Bays.

Plaintiff recognized that bays constitute inland waters in its statement accompanying the original complaint filed in this case in October, 1945, where it said,

> "This suit does not involve any bays, harbors, rivers, or other inland waters of California, . . . "

Of the seven segments under consideration in this proceeding, five are within areas claimed by California as to constitute bays. We have already shown that two of the five claimed bays are within what California claims to be the over-all unit of inland waters formed by the exterior coastline extending around the off-lying islands. If the Court sustains this claim, it will be unnecessary to consider the question of bays in these two segments. But, in any event, in at least three segments, an important question will be how to define a bay.

The term *bay* has long defied attempts to define it in precise terms. In its brief in support of its original motion for judgment in the present case, Plaintiff made use of the term *true bay* in an attempt to distinguish certain bays, which the United States had previously admitted to constitute inland waters, from other bays which Plaintiff classed as "doubtful." For example, bays such as San Francisco Bay and Chesapeake Bay, even though the latter is more than 10 miles wide at its entrance, were classed as true bays. But bays such as Massachusetts Bay, Santa Monica Bay and Monterey Bay were classed as "doubtful." In making this distinction between true bays and doubtful bays, Plaintiff's counsel conceded that there are some bays which may be classed as inland waters on purely

historical grounds, regardless of their physical configuration.

The difficulty of defining a bay is apparent in the article by S. W. Boggs, Geographer of the State Department, in the American Journal of International Law in which the proposal now advanced by Plaintiff for determining the baseline of the marginal belt is explained and discussed. Mr. Boggs first retreated from his attempt to define a bay by falling back on such terms as *bona fide bay* and *true bay*, and later he gave up the effort altogether. (24 A.J.I.L. 541 (1930).)

The impossibility of erecting a precise mathematical test to determine whether a particular water area is a bay is borne out by the fact that, apart from the question of bays fixed by historical usage, there is no general rule either in American or international law for determining what constitutes a bay.

The United States has never officially committed itself to any fixed definition of a bay. The absence of any fixed rule in American law is demonstrated by the so-called Liquor treaties concluded between Great Britain and the United States, January 23, 1924.[23] An Article of that treaty reads as follows:

> "The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limit of territorial waters."

The phrase "extending from the coastline outwards" was inserted at the request of Secretary of State Charles Evans Hughes, "in order to avoid a detailed statement with respect to ports, bays, harbors, etc." (U. S. Foreign Relations, 1923, I., p. 22). This request reflects the lack of an authoritative test for determining what constitutes bays or harbors.

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[23] U. S. Treaty Series, No. 685.

The lack of any fixed standard for defining bays prompted Charles Chenney Hyde to suggest the following with regard to the bays of Alaska:

> "The coast of Alaska is indented by certain bays of broad dimensions which, by reason of their relation to the land, appear to belong in a geographical sense to the sovereign thereof. Kotzebue Sound (facing the Arctic Ocean) or the inner portions of it, Golofnin Bay inside of a line from Cape Nome to St. Michael Island, Kuskokwim Bay, Bristol Bay (inside of a line drawn from Igagik to Protection Point), Cook Inlet from a line drawn between Cape Elizabeth and Kaguyak, and Yakutat Bay inside of Ocean Cape, are instances. They are water areas which, *regardless of the distance between headlands*, it is believed that the United States may formally claim to be its own without violating any requirement of international law." (International Law (vol. I, pp. 473 et seq.))

Reference to a map of Alaska will show that the particular bays and sounds mentioned in the above quotation are vastly larger than any of the water areas claimed by California as inland waters.

There is likewise no fixed definition for bays in international law. M. A. H. Charteris in an article presented to the International Law Society discussing the North Atlantic Coast Fisheries Arbitration observed that that distinguished tribunal unanimously agreed that *"a general rule for bays does not exist in international law"*. The lack of any settled standard concerning bays is well summed up in the memorial of Norway in the Anglo-Norwegian Fisheries case now pending before the International Court of Justice. In the section of this memorial which sets out the practices of many nations with regard to bays, Norway says:

> "Since the practice of the States constitutes the principal element of proof which must be taken into account in establishing the existence of a custom, it is necessary, if an exact idea of the state of international

law in the question of bays is to be had, to see whether the States in fact conform to the 10-mile rule (or to any other rule fixing a determined limit for the opening of territorial bays). But if one proceeds in this examination, one realizes, even better than in the light of the doctrine, that such a rule does not exist.

"Very numerous are the bays over which riparian States proclaim and in fact exercise their sovereignty without submitting in this respect to any mathematical formula, and, among these bays, there are frequently bays whose opening is sensibly larger than the measures specified in the British memorial.". (¶ 378)

The lack of any established rule of international law as to the definition of the term bay is shown by the decision of the tribunal in the North Atlantic Coast Fisheries Arbitration. This arbitration, which arose out of a dispute over a treaty between the United States and Great Britain, has special importance because it is one of the rare occasions—if not the only instance—in which an international tribunal has considered the term *bay*. The Treaty, which was entered into in 1818 for the purpose of regulating fisheries in the North Atlantic, provided that the United States renounced forever the right or liberty,

> " . . . to take, dry, or cure fish on, or within three marine miles of any of the coasts, *bays*, creeks, or harbours of His Britannic Majesty's dominions in America . . . "

Under this provision it was necessary for the tribunal to define the term "bay" and to determine the seaward limit of all bays in the disputed area.

The United States contended that the indentations whose entrance was broader than six miles did not constitute bays. Great Britain contended that the word *bay*, when unqualified as it was in the treaty, meant "all bays generally." The Tribunal decided the word *bay*, as used in this treaty,

> "must be interpreted in a general sense as applying to every bay in the case in question that might be rea-

sonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing."

To illustrate the size and configuration of some of the water areas which were held to be bays by the Tribunal, two maps reproduced from the official records of the Arbitration proceeding are set forth following this page. Egmont Bay, which is shown on the first map following this page, illustrates a semi-circular type of bay which, like some of the California bays here in issue, is wider at its mouth than between any of the points in its circumference. The six mile line shown on the map is the line which was claimed by the United States to be the outer limit of the bay. It is doubtful if any part of Egmont Bay would be found to be a bay under Plaintiff's formula. But the entire Bay which is 17 miles wide at its entrance was held to be a bay by the Tribunal.

Miramichi Bay, which is shown on the second map following this page, is another wide-mouth indentation which was determined to be a bay. Even the part inside the chain of islands would probably not be a bay under Plaintiff's formula.

The decision of the Tribunal also designated a dozen or more other bays which are more than ten miles wide at their mouths. The varying sizes and shapes of these bays illustrates the complete absence of any fixed criteria for determining what constitutes a bay.

While the United States has never defined the term *bay* and its definition is not fixed in international law, a great majority of other maritime nations have enacted laws or decrees which either claim certain bays as inland waters or set up definite criteria for determining what constitutes a bay. Examination of examples of the laws of other nations will show the wide variation in the definition and criteria adopted. More important, these examples will show that water areas of a wide range of sizes and configurations are claimed by other nations to be bays. They demonstrate beyond a doubt that there is no limitation in

international law as to the width or depth of bays or the amount of water which may be claimed.

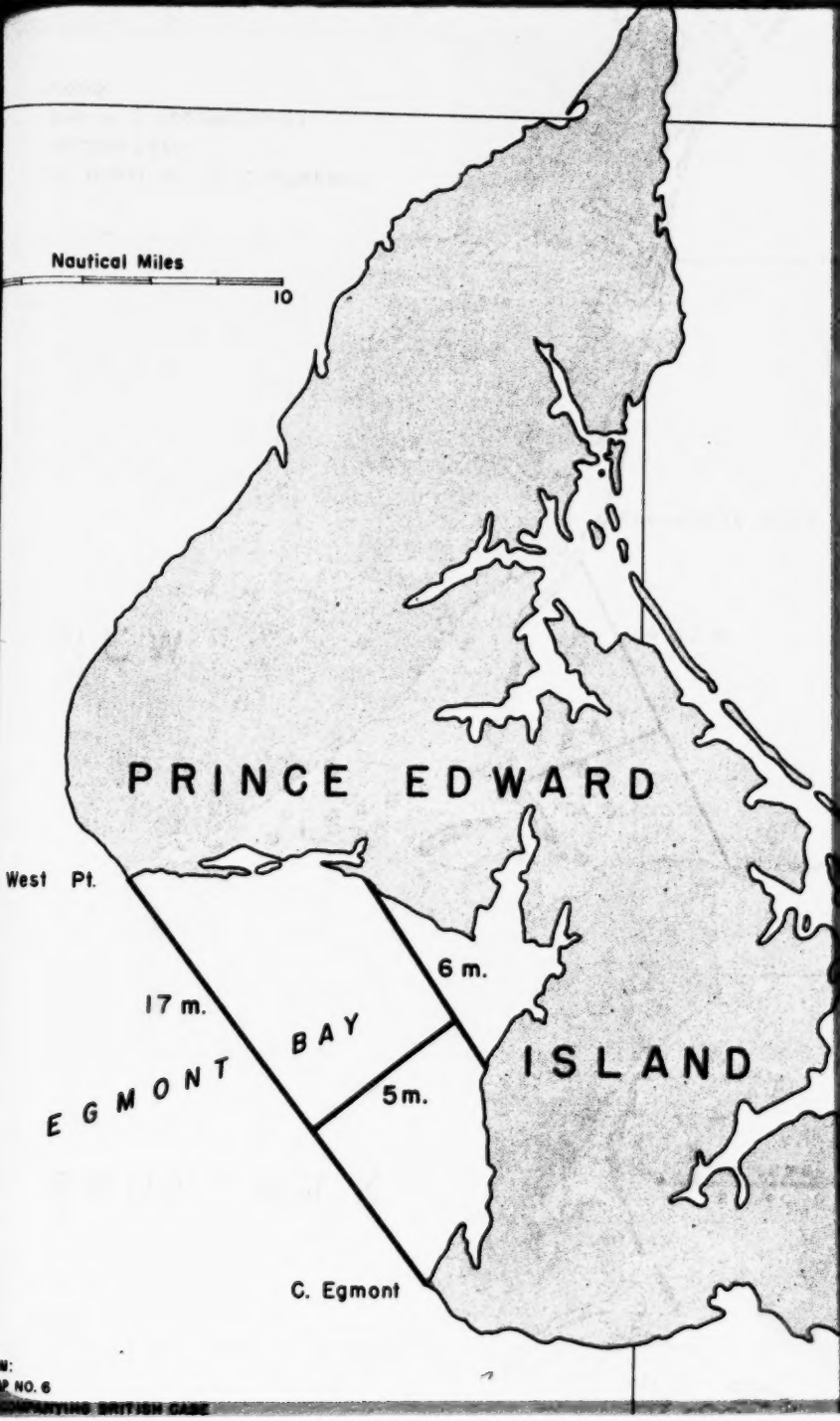
Canada. There is no law in Canada restricting the claims of that country with regard to the size of its bays or the width of their entrances. But, without regard to dimensions, Canadian laws do name certain bays which are claimed as inland waters. For instance, Hudson Bay which has an entrance about sixty miles wide, was claimed by the Act of 1906. (Citation of Documents, p. 83.)

The position of Canada with regard to the Gulf of St. Lawrence is an excellent example of a broad claim to a bay made by a neighboring nation. In 1948 the limit of the inland waters of this Gulf was established as a line from Cap des Rosiers to West Point, Anticosti Island (about sixty-two miles) and from West Point to the north shore (about twenty-five miles). This Act amended a prior statute which had placed the inland water limit further west at a narrower part of the Gulf. In other words, in 1948, Canada, by Act, extended the limit of this inland water area to the line above described.

Shortly after the annexation of Newfoundland to Canada in 1948, the Prime Minister of Canada made a statement in the House of Commons, reading in part as follows:

> "We intend to contend, and hope to be able to get acquiescence in the contention that waters west of Newfoundland constituting the Gulf of St. Lawrence shall become an inland sea." (Citation of Documents, p. 88.)

The line described in the 1948 Act and the line further seaward which was indicated by the Prime Minister are shown on the third map following this page. It will be seen that the effect of the 1948 law and of the proposal of the Prime Minister would be progressively to enlarge and extend seaward the inland waters of that country. The size of these water areas shows that Canada recognizes no arbitrary limit for the size of its bays or the width of the channels.



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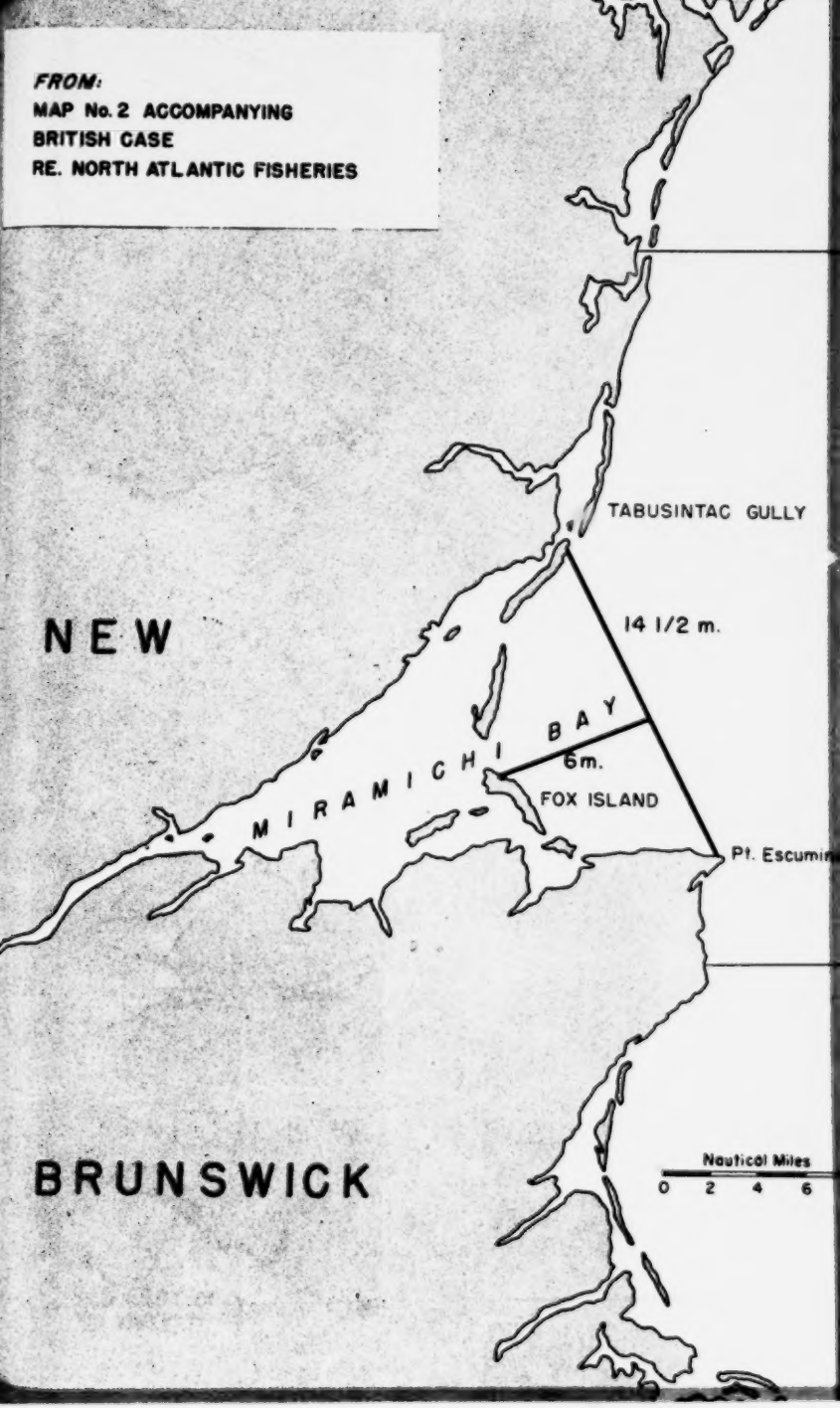
FROM:
MAP No. 2 ACCOMPANYING
BRITISH CASE
RE. NORTH ATLANTIC FISHERIES
TABUSINTAC GULLY
NEW
14 1/2 m.
MIRAMICHI BAY
6m.
FOX ISLAND
Pt. Escumin
BRUNSWICK
Nautical Miles
0 2 4 6

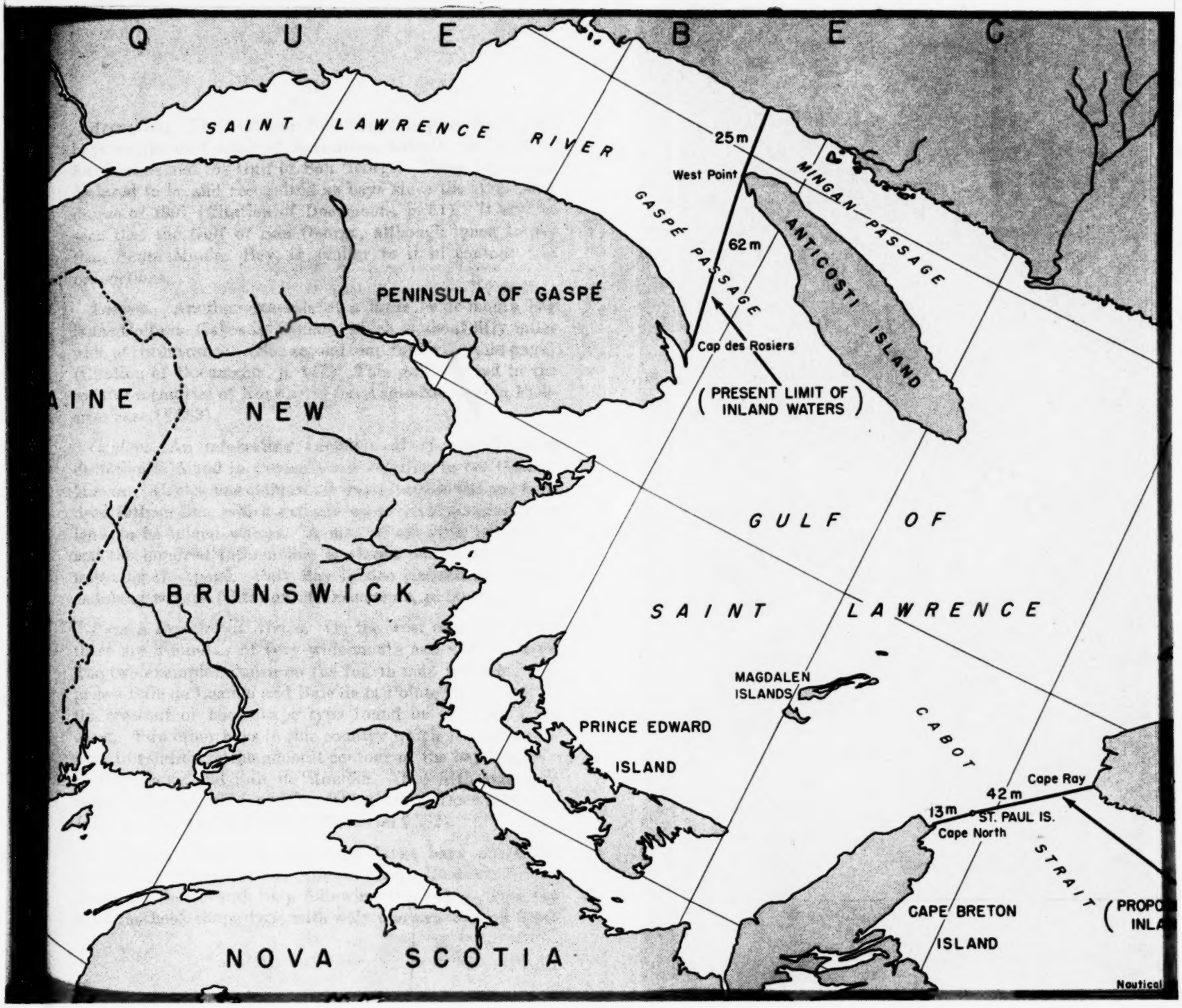
Q U E B E C
SAINT LAWRENCE RIVER
25m
West Point
MINGAN PASSAGE
GASPÉ PASSAGE
62m
ANTICOSTI ISLAND
PENINSULA OF GASPÉ
Cap des Rosiers
(PRESENT LIMIT OF INLAND WATERS)
AINE
NEW
BRUNSWICK
GULF OF
SAINT LAWRENCE
MAGDALEN ISLANDS
PRINCE EDWARD
ISLAND
CABOT
Cape Ray
42m
13m
ST. PAUL IS.
Cape North
STRAIT
CAPE BRETON
ISLAND
NOVA SCOTIA
Nautical

Table Head
16 1/2 m
BELLE ISLE
STRAIT OF BELLE ISLE
14 1/2 m
Cape Bauld
52°
(PROPOSED LIMIT OF
INLAND WATERS)
50°
UNDLAND

Argentina. The first map following this page shows two bays on the east coast of Argentina, namely, the Gulf of San Matias and the Gulf of San George. These have been declared to be and recognized as bays since the Argentina decree of 1907 (Citation of Documents, p. 61). It will be seen that the Gulf of San George, although much larger than Santa Monica Bay, is similar to it in contour and proportions.

Tunisia. Another example of a large, wide-mouth bay is the Golfe de Gabes in Tunisia, which is about fifty miles wide at its entrance. (See second map following this page) (Citation of Documents, p. 147) This gulf is cited in the counter-memorial of Norway in the Anglo-Norwegian Fisheries case (¶ 383).

Ceylon. An interesting variation of an inland water definition is found in Ceylon's law relating to the Gulf of Mannar. Ceylon has claimed all waters within the one hundred fathom line, which extends up to sixteen miles from land, to be inland waters. A map of the Gulf of Ceylon and the hundred fathom line is shown on the third map following this page. Palk Bay is also claimed by Ceylon as inland waters (Citation of Documents, p. 90 et seq.).

French Equatorial Africa. On the west coast of Africa there are a number of very wide-mouth and shallow bays. The two examples shown on the fourth map following this page—Baie de Loango and Baie de la Pointe Noire—are of the crescent or hook-shape type found on the California coast. Two other bays in this country which are extremely wide in relation to the general contour of the bay are Baie de Cap Lopez and Baie de Mondah. (See fifth and sixth maps following this page) (Citation of Documents, p. 147b; see Norwegian Counter-Memorial ¶ 382)

Australia. Australia has many large bays which are claimed as inland waters. One of these, Roebuck Bay, is shown on the seventh map following this page. This bay is of the hook-shape type with only one pronounced head-

land. (Citation of Documents, p. 65) This is also cited in the counter-memorial of Norway (¶ 380).

Russia. Russia likewise claims many large bays. One of the best examples is the White Sea. As the eighth map following this page shows, Russia claims not only the White Sea but the entire broad channel approaching it. The entrance to this channel is 89 miles in width. Although it is impossible to do so within the confines of this brief, it would seem highly pertinent to examine all of the claims of Russia as to other bays. A number of references are found in the Citation of Documents, p. 305, et seq.

Iceland. A 1925 Iceland statute provided that the base line of the marginal belt should be measured "from the outermost reefs and islets which project above the sea." The same law also provided that bays and fjords are inland waters within the outermost line which is not more than twelve miles long. (Citation of Documents, p. 200). This law, of course, applied as a general rule to the entire coast of Iceland. However, by the special enactment of regulations in April 1950, Iceland laid down a new base line along the northerly coast of the island, connecting twelve points which are named in the regulations. This line follows the principle of the exterior coast line, running along the outer side of all islands and crossing all indentations from point to point whether they are specifically classed as bays or not. The ninth map following this page shows the line as defined by this regulation and the width in miles of the enclosed water areas.[24]

The case of Iceland illustrates the point that inland waters are not necessarily limited to bays in the historic or conventional sense. Any water area lying within the exterior coast line may be declared by the sovereign to be inland waters.

The practices of the nations of the world with regard to bays may be summarized as follows: While this summary

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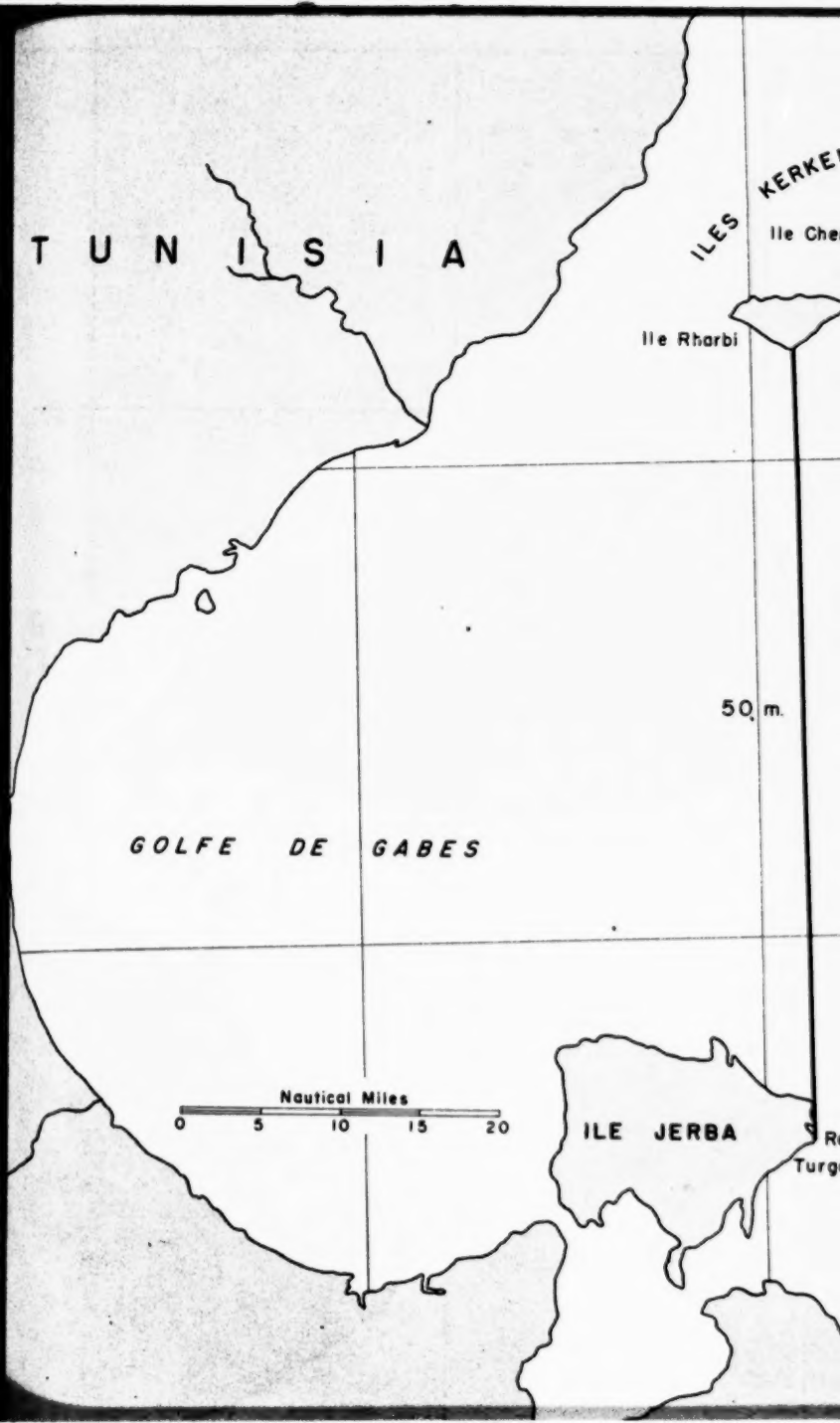
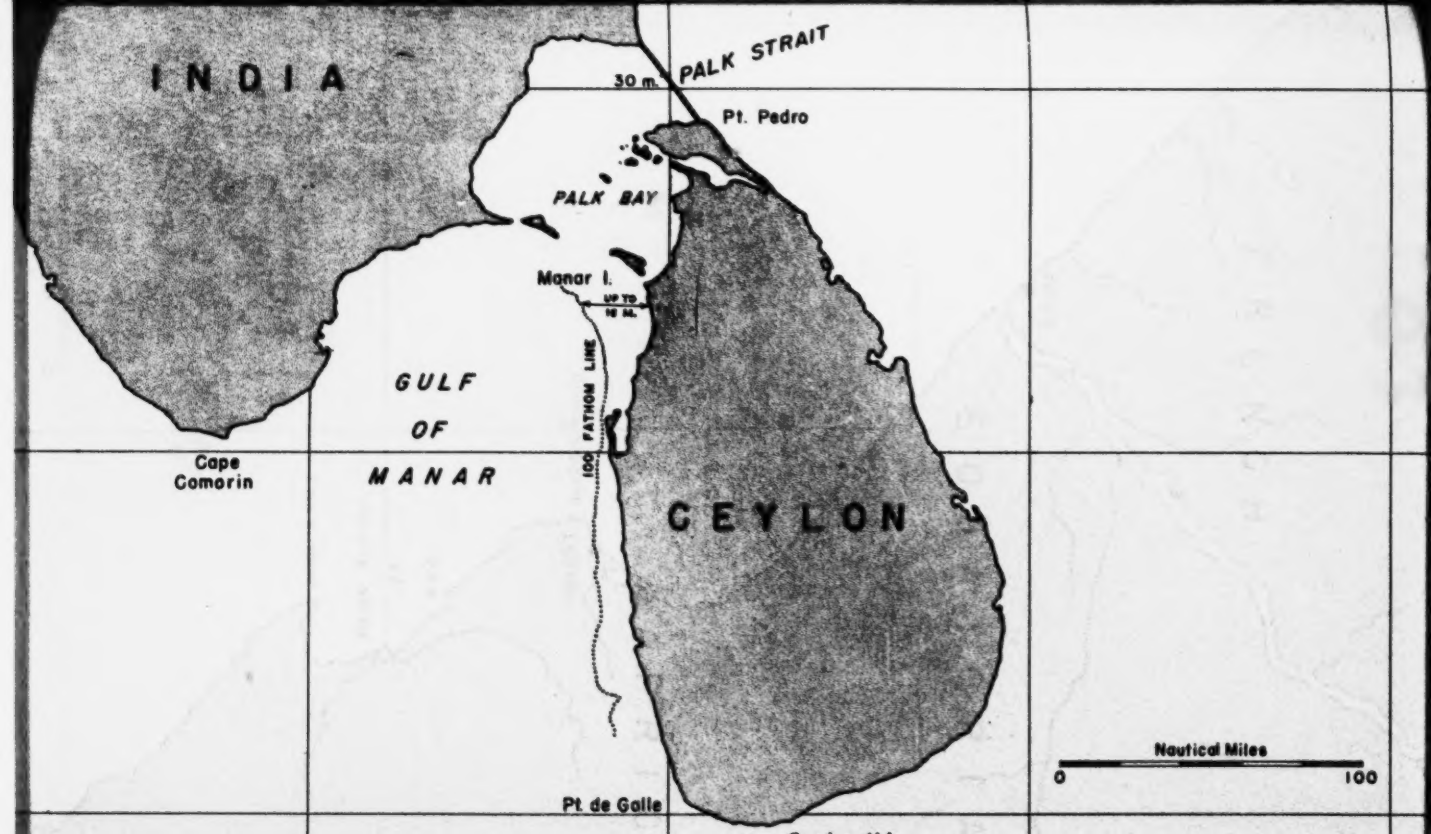
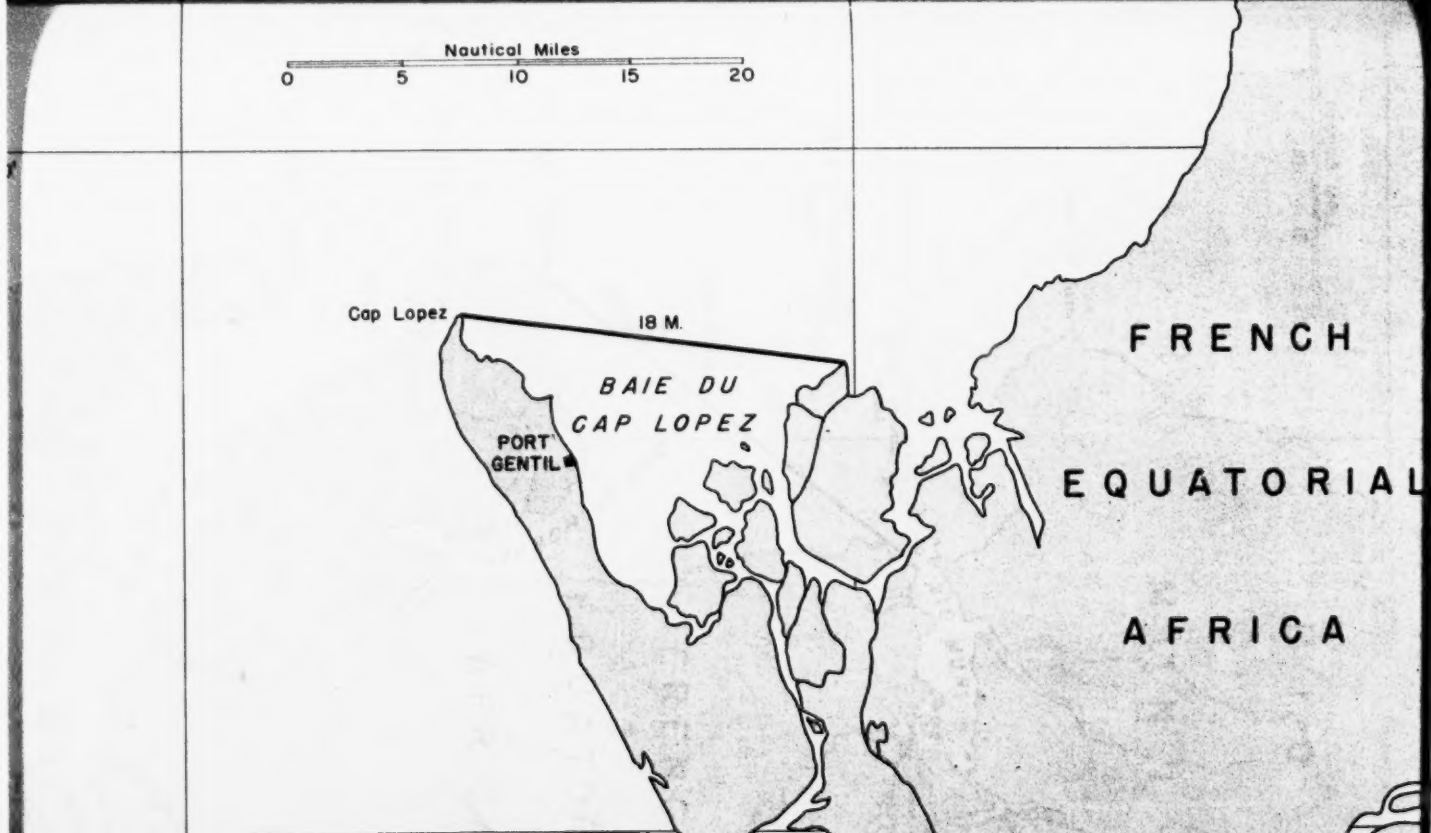
[24] This regulation was received too late to incorporate in the Citation of Documents.

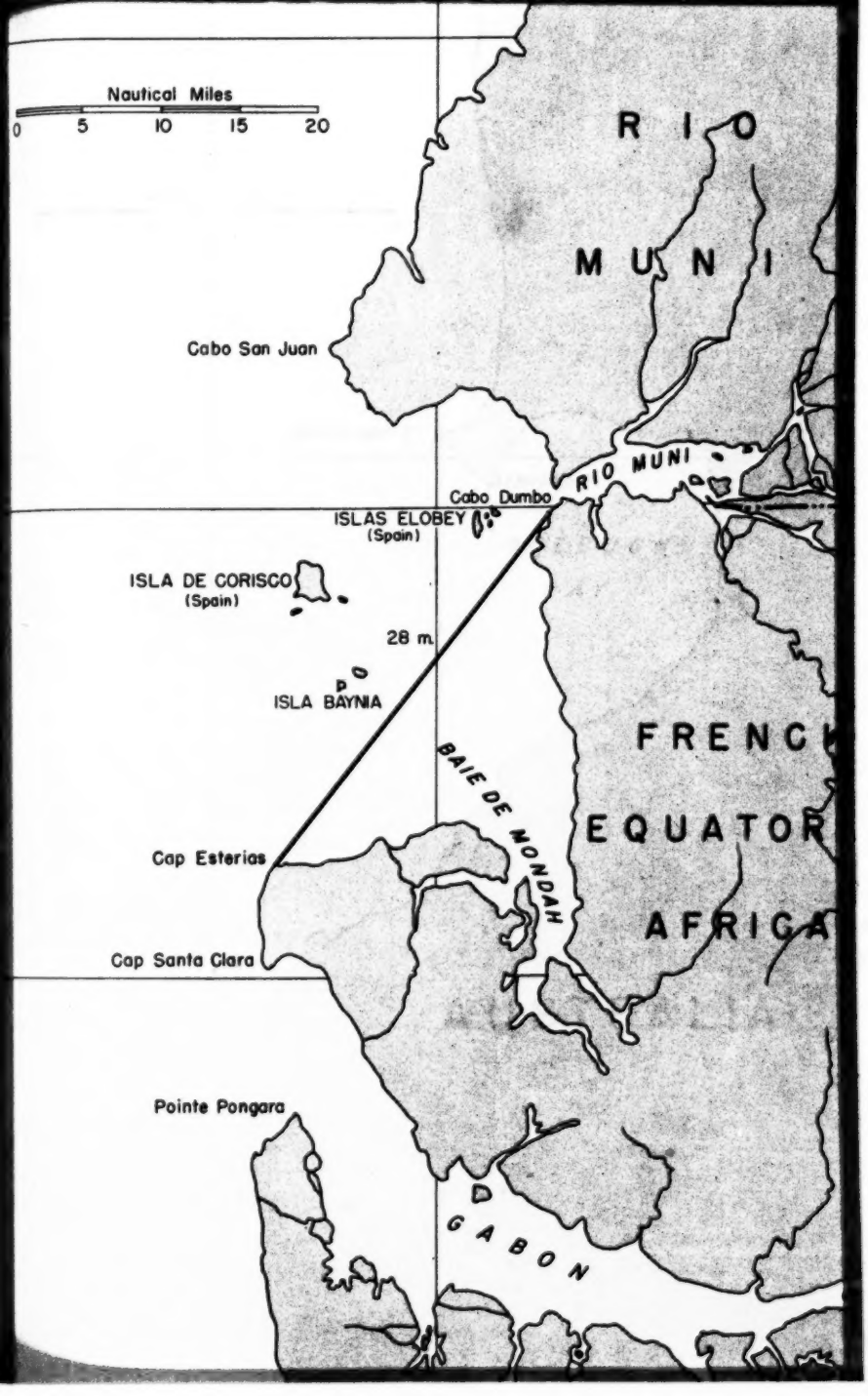
ARGENTINA
GOLFO SAN MATIAS
Pta. Bermeja
55 m.
Pta. Norte
Peninsula Valdes
Pta. Delgada
C. dos Bahias
125 m.
GOLFO SAN JORGE
C. Tres Puntas
Nautical Miles
0
50
100

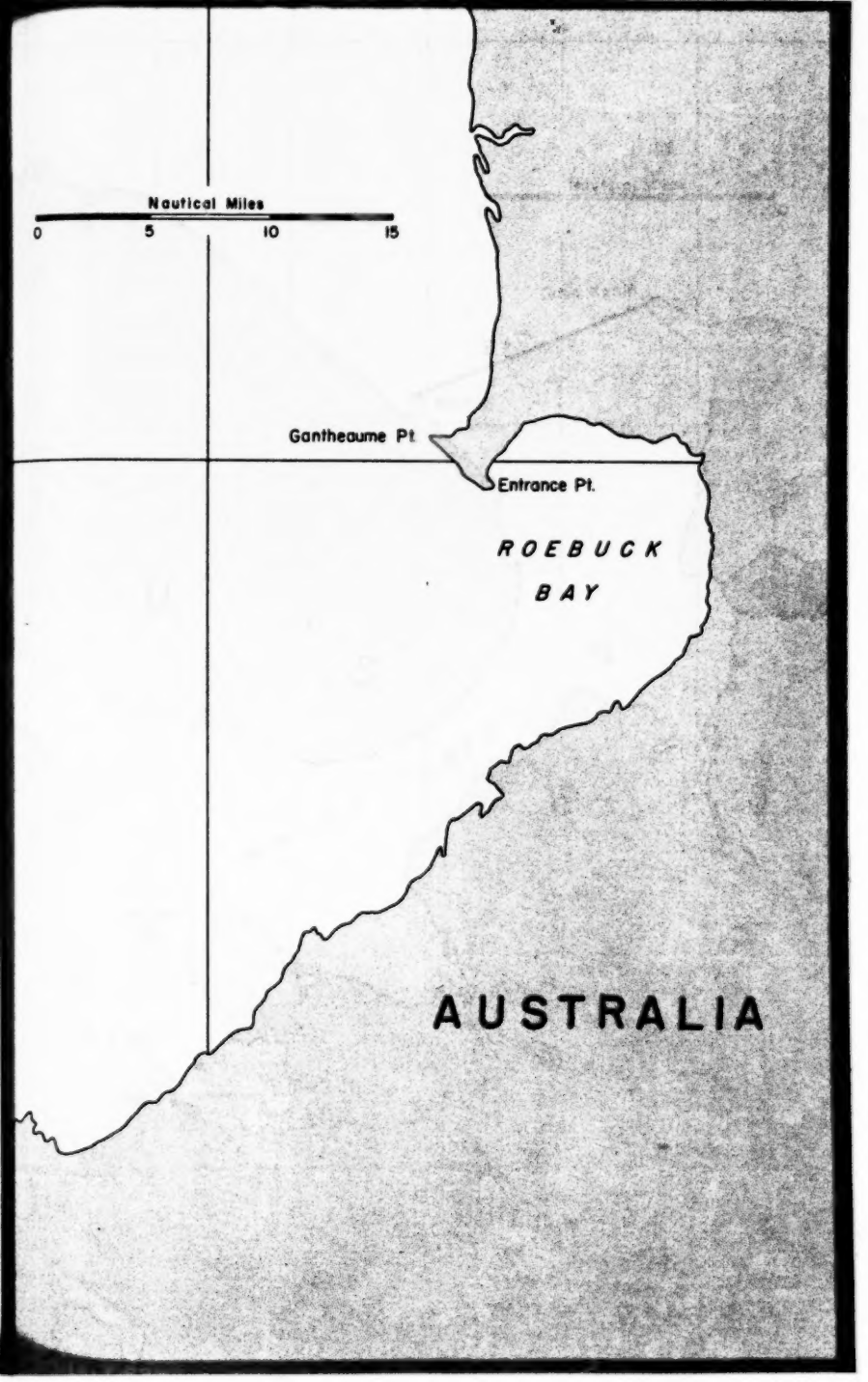

TUNISIA
ILES KERKE
Ile Che
Ile Rharbi
50 m.
GOLFE DE GABES
Nautical Miles
0 5 10 15 20
ILE JERBA
R
Turg

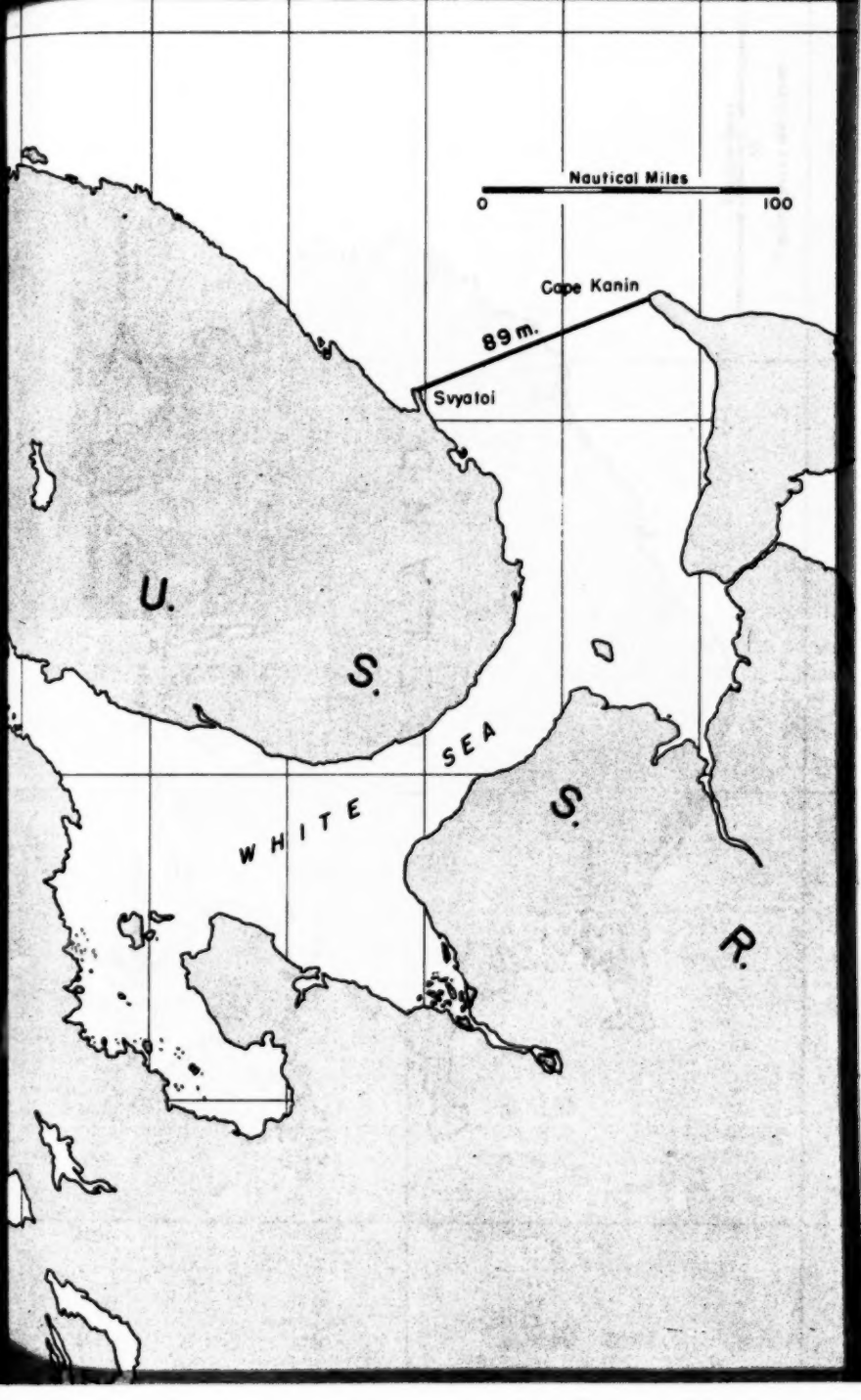

INDIA
30 m.
PALK STRAIT
Pt. Pedro
PALK BAY
Manar I.
UP TO
16 M.
100 FATHOM LINE
GULF
OF
MANAR
Cape
Comorin
CEYLON
Pt. de Galle
Nautical Miles
0
100

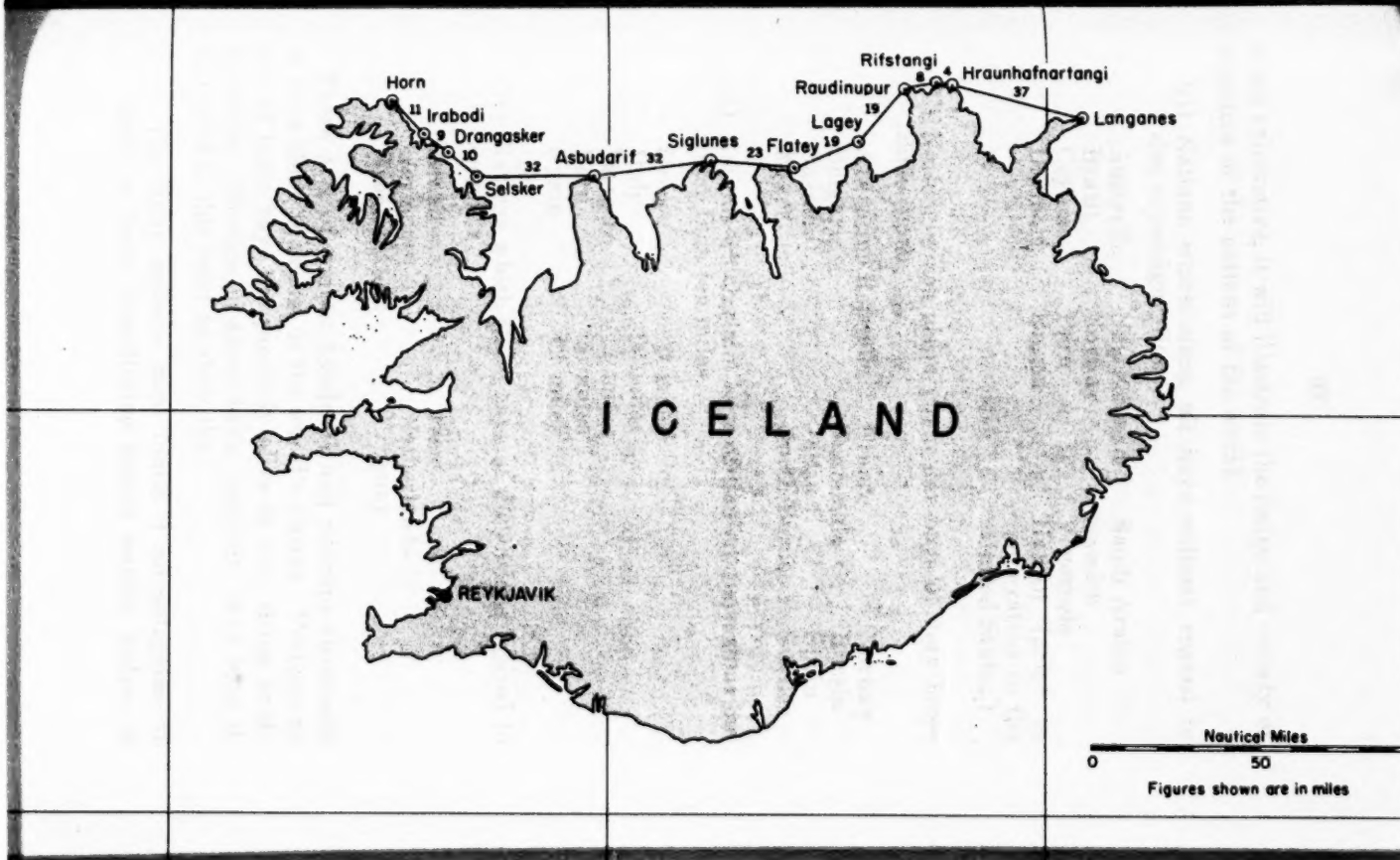
FRENCH
KAYES
EQUATORIA
BAIE
DE LOANGO
AFRIC
Pointe Indienne
LOANGO
BAIE
DE
POINTE NOIRE
Pointe Noire
Nautical Miles
2
4
6
8
10


Nautical Miles
0
5
10
15
20
Cap Lopez
18 M.
BAIE DU
CAP LOPEZ
PORT
GENTIL
FRENCH
EQUATORIAL
AFRICA


Nautical Miles
0 5 10 15 20
RIO MUNI
Cabo San Juan
RIO MUNI
Cabo Dumbo
ISLAS ELOBEY
(Spain)
ISLA DE CORISCO
(Spain)
28 m.
ISLA BAYNIA
BAIE DE MONDAH
FRENCH
EQUATOR
AFRICA
Cap Esterias
Cap Santa Clara
Pointe Pongara
GABON


Nautical Miles
0
5
10
15
Gantheaume Pt.
Entrance Pt.
ROEBUCK
BAY
AUSTRALIA


Nautical Miles
0
100
Cape Kanin
89 m.
Svyatoi
U.
S.
S.
R.
WHITE
SEA


Horn
11
Irabodi
9
Drangasker
10
Selsker
32
Asbudarif
32
Siglunes
23
Flatey
19
Lagey
19
Raudinupur
8
Rifstangi
4
Hraunhafnartangi
37
Langanes
ICELAND
REYKJAVIK
Nautical Miles
0
50
Figures shown are in miles

is not exhaustive, it will illustrate the range and variety of practices of the nations of the world.

(i) Nations which claim all bays without regard to size or configuration

Australia	New Zealand	Saudi Arabia
Brazil	Norway	Sweden
Ceylon	Peru	Venezuela
Denmark	Russia	Hawaii (prior to annexation to the United States.)

(ii) Nations which claim particular bays of very large dimensions

Argentine Republic	France	Norway
Bulgaria	Guatemala	Russia
Canada	Japan	Spain
Egypt	North Borneo	Sweden

(iii) Nations which claim bays of limited dimensions but wider than ten miles

Greece	20 miles
Italy	20 miles
Morocco	12 miles
Peru	20 miles
Spain	12 miles

(iv) Nations which claim bays of dimensions limited to ten miles

Brazil	Iran
Germany	Netherlands
Great Britain	Uruguay

There are, of course, hundreds and perhaps thousands of bays along the coast of the world's oceans. Perhaps no two of these bays are precisely alike in size, shape or dimensions. Enough of these bays, however, have been illustrated in this brief to show that:

(1) Many nations have found it advantageous to claim as bays, constituting inland waters, bodies of

water of the same general configuration, and larger in dimensions than those claimed by California;

(2) A general rule for bays does not exist in international rule;

(3) The question whether a particular body of water is or is not a bay does not in any way depend on the size or configuration of the area or on the amount of water which may be involved. A bay may be long and narrow, or wide and shallow, but the seaward limit in every case is a political line based upon laws or decrees of a sovereign state and not upon any mathematical formula or any arbitrary limitation of distance;

(4) The United States is free, if it finds that it is in its national interest to do so, to recognize and declare that all the waters within the five bays claimed by California are wholly inland waters.

Ports and Harbors.

In its statement in support of its motion to file this action in October, 1945, Plaintiff also stated that ports and harbors constitute inland waters when it said,

> "This suit does not involve any . . . harbors . . . or other inland waters of California."

Again in the opening brief, the United States represented to the Court that "no claim is here made to any lands under ports, harbors, . . ." And in the *California* decision, the Court noted that inland waters, which were not claimed by the United States, included ports and harbors (332 U. S. at 25-26).

Despite these statements, Plaintiff now proposes a method for determining the baseline of the marginal sea which fails to make any provision whatsoever for treating ports and harbors as inland waters. Plaintiff's pro-

posal would exclude from inland waters such ports and harbors as those at Newport Beach, Ventura, and Santa Barbara.

The failure of Plaintiff's method to take into account ports and harbors creates an especially serious situation in the Los Angeles-Long Beach harbor in San Pedro Bay. The Master's Report states that the Plaintiff proposes a baseline for the marginal belt which "cuts through the outer reach of the existing government breakwater at San Pedro." (P. 6.) The map of San Pedro harbor following this page shows that under Plaintiff's proposal, a large area within San Pedro Harbor works is excluded from inland water and placed in the marginal belt.

There is neither authority nor reason to support Plaintiff's position. The Master's Report points out that Plaintiff maintains the propriety of fixing the baseline inside the breakwater notwithstanding the fact, "that the American proposals at the Hague Conference upon which it relies for the delimitation of bays, estuaries and river mouths provided with respect to ports that the outermost permanent harbor works shall be regarded as part of the coast in determining the baseline of the marginal belt." (p. 6.) The exact wording of the American proposal relating to ports is as follows:

> "In front of ports, the outermost permanent harbour works shall be regarded as a part of the coast in determining the extent of the territorial waters." (Basis of Discussion No. 10.)

Where the tentative American proposal at the Hague Conference of 1930 suits its purpose, Plaintiff seeks to elevate the proposal to the status of the "American Method" or of a "development in international law." But when part of the proposal does not correspond with its claim, Plaintiff takes the paradoxical position that the proposal can be completely ignored.

There is no evidence that Plaintiff's proposal to place the baseline inside the outermost harbor works is supported

by the practice of any foreign nation. The fact is that most harbors are either assumed to be in inland waters or are contained in a bay or other unit of inland water. This is true of San Pedro Harbor which is claimed by California to be completely within San Pedro Bay as well as within the over-all unit of inland waters formed by the off-lying islands. But every nation which is known to have defined the status of its ports has placed the baseline of the marginal belt either at or beyond the outermost harbor works. An Egyptian decree of January 1951 provided that the baseline of the marginal sea shall be as follows:

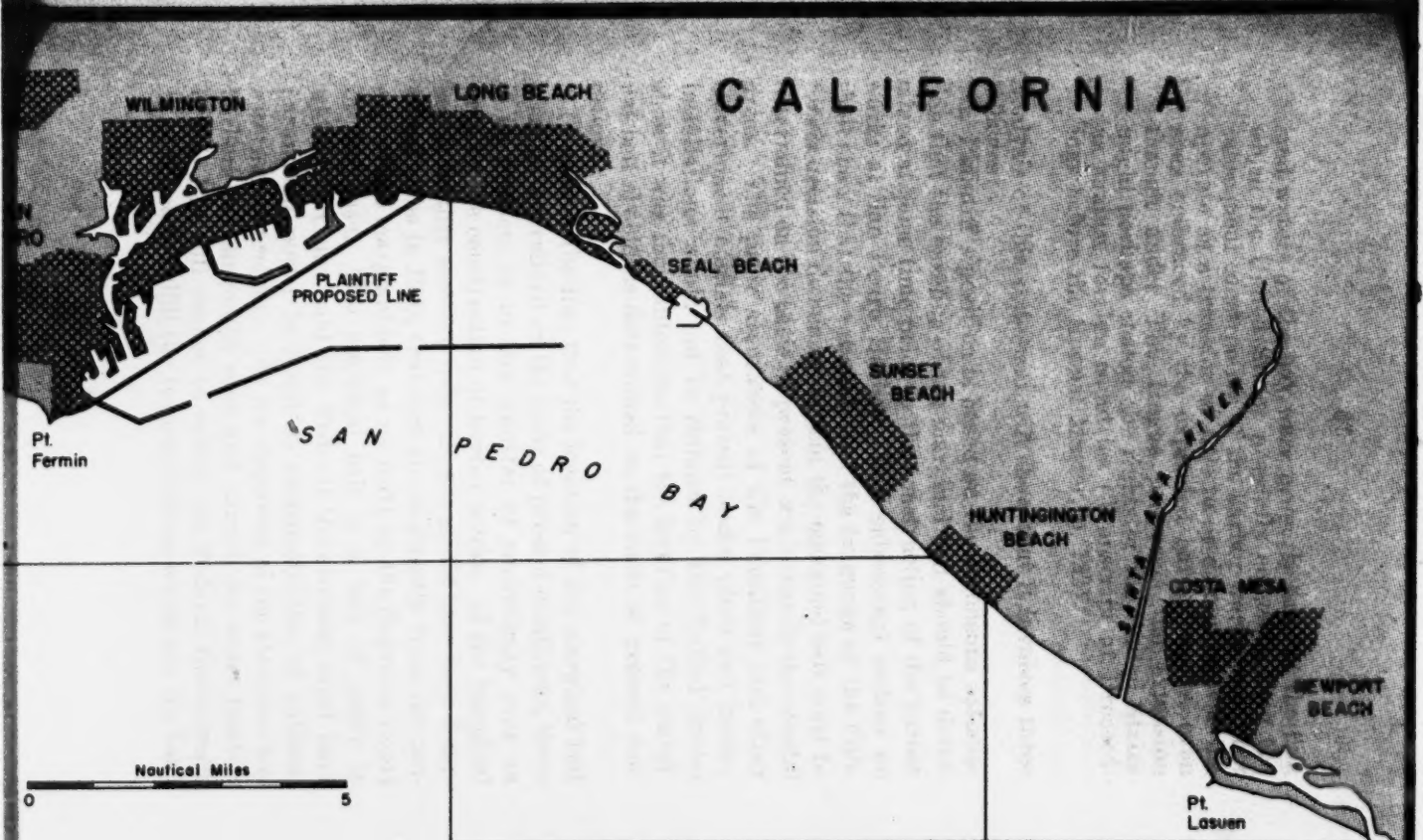
> "In the event that a port or harbor confronts the sea: lines drawn along the seaward side of the outermost works of the port and harbor and similarly lines drawn between such works." (Article 6 (d)).

In the harbor at Gibraltar, Great Britain has fixed the baseline of the marginal sea 200 yards outside the outermost harbor works. (Citation of Documents, p. 179). Many other examples will be found in the Citation of Documents.

The full inconsistency of Plaintiff's proposal to fix the marginal belt inside San Pedro Harbor can only be appreciated by reference to the nature of the marginal belt. The Supreme Court said that whatever a nation does in the marginal belt is a question for consideration among nations as such and a subject upon which nations might enter into treaty or similar obligations. (332 U. S. at 35) Indeed, the rights of foreign nations in the belt are such that the Supreme Court said that it is in the "international domain." (*United States* v. *Texas*, 339 U. S. 707, 719.) Under plaintiff's proposal, this area of the international domain is fixed inside the permanent harbor works of one of our most important military and commercial ports.

The Master's Report states the Plaintiff's argument in support of its proposal concerning San Pedro Harbor, as follows, (p. 6):

> "It takes the position that if prior to the construction of these harbor works the seaward boundary of the in-


CALIFORNIA
WILMINGTON
LONG BEACH
SEAL BEACH
PLAINTIFF
PROPOSED LINE
SUNSET
BEACH
Pt.
Fermin
SAN PEDRO BAY
HUNTINGINGTON
BEACH
SANTA ANA RIVER
COSTA MESA
NEWPORT
BEACH
Pt.
Lasuen
Nautical Miles
0
5

land waters of the bay were properly fixed at the line which the United States presently suggests, then the subsequent construction of the harbor works would not operate as a transfer of title to or dominion over the area embraced by the expanded harbor works, even though under The Hague proposals the extension might perhaps change the rights of the United States as against foreign countries (Transcript of Proceedings before the Special Master, p. 122)."

Analysis of this statement will show that it involves three fallacies:

1. Plaintiff's position is based on the erroneous assumption that the baseline of the marginal belt should be determined at some time prior to the construction of the harbor works at San Pedro Harbor. In a subsequent section we shall show that the rationale and the language of the *California* decision demonstrate that the marginal belt must be determined on the basis of present conditions in the coastal areas. The prior assurances of the President and other Government officials that present docks, piers and harbor installations would not be claimed by the United States show it was their intention that the location of the marginal belt should be determined on the basis of present conditions.

In view of the fact that the location of the marginal belt must be determined on the basis of present conditions, there is no problem as to any transfer of sovereignty over an area by the construction of harbor works. If the marginal belt is farther seaward today than it would have been determined to be in 1900, that fact stems directly from the concept of the marginal belt, as set forth by the S reme Court in this case. The marginal belt is a *belt of water* in which the Court said the Federal Government must have paramount power to fulfill its responsibilities of national external sovereignty. As the character of the shoreline and harbors is changed by man and nature, the exact location of this belt will change to enable the Federal Government to continue to fulfill the responsibilities which are the basis

of the Government's paramount power in this three-mile belt.

(2) The breakwater at San Pedro Harbor was constructed by the United States under the direction of the United States Army Engineers. Any change in the location of the marginal belt that might have resulted from the construction of the breakwater was thus fully authorized by the Federal Government.

(3) Plaintiff proposes a double standard by saying that the breakwater might perhaps change the rights of the United States as against foreign countries, but would not have such an effect as against the states. Earlier in this brief, we have pointed out the inconsistency of such a double standard. The paramount powers of the United States in the marginal sea depend upon the existence of foreign rights in that belt. If the construction of the breakwater pushes seaward the area in which foreign nations have rights (as the Plaintiff says), then it removes the basis of the Federal Government's paramount rights in the area from which the foreign nations have been ousted. In any area where foreign nations have no rights, the reasons for the federal paramount power are not present and the rights of the state will exist as in any other inland water area.

Geography.

Another factor which is ignored in the Plaintiff's proposal is the geographical differences between various coastal areas. Plaintiff's formula for bays starts with the arbitrary assumption that for an identation in the coast line to constitute a bay, it must be deeper than it is wide at the entrance. As we have shown by many examples, this arbitrary assumption is contrary to the actual practice of almost every maritime nation. The reason for this is that the determination of what constitutes a bay in other nations is based on human needs rather than on geometrical formulae.

It is true that bays on the Atlantic Coast are generally

deep in relation to their width. That is due to the fact that the Atlantic Coast is rugged and irregular. But it does not follow that bays on all coasts must be deep in relation to their width.

Whether a particular identation constitutes a bay must be considered in relation to the geographical character of the particular coast line and coastal area in which it occurs. A coast line that is rugged and irregular will naturally have different types of bay than are found on a fairly regular coast line. This important geographical fact is pointed out and the reason for it given in the summary of testimony of Dr. U. S. Grant IV, as follows:

> "This difference (in the coastlines) is due to the very different recent geologic histories of the two oceanic margins of the United States. Along the Atlantic coast subsidence of the land in late geologic time has produced an inundation of many broad river valleys by the sea, producing large embayments such as Chesapeake Bay, Narragansett Bay, etc. In the north, glacial features produced by the continental glacier have resulted, in many cases, in the existence of islands relatively close to shore behind which protected waters exist in the nature of "inland waters". In Boston Bay and north and south thereof, the glacial features—for example islands—afford protection for shipping and suitable sites for piers, etc. Along the California coast landlocked bays are exceptional. The shoreline is one that has been produced in large part by elevation of the land with respect to the sea with subsequent marine erosion responsible for the minor irregularities." (Summary of Testimony of Typical Witnesses, p. 141).

As a result of these geologic factors, bays on the California coast tend to be of the wide-mouth and semi-circular type (such as Monterey and Santa Monica Bays) and of the crescent or hook-shape type with a pronounced headland at one end and a considerably smaller headland at the other (such as San Pedro, Crescent City, and San Luis Obispo bays.) Such bays as San Francisco and San Diego are marked exceptions to this general rule. The examples al-

ready pictured from the west coast of Africa and Australia show that the semi-circular crescent or hook-shape bay is characteristic of a fairly regular coast line.

A proper recognition of the geographical differences between the East and West coasts of the United States would reflect the fact that indentations which provide suitable shelter for ports and harbors are relatively scarce on the California coast in contrast to the many which exist on the Atlantic shore. In the California coastal area where places of shelter are at a premium, it is vital to designate every useful indentation as a bay within the exclusive jurisdiction of our nation. This situation is well stated in the summary of the testimony of Dr. U. S. Grant, as follows:

> "The 1100 miles of coast line bordering the State of California on the west is notable for its few bays and harbors compared to equivalent lengths of the coast line of the eastern United States bordered by the Atlantic Ocean."
>
> • • • • • • • • • • •
>
> "The relative scarcity of embayments along the California coast makes it vital to recognize the value of such as exist in a nearly natural condition suitable as harbors to facilitate commerce, national defense and to provide refuge to navigators." (Summary of Testimony of Typical Witnesses, pp. 140-142.)

To ignore the relative scarcity of sheltered indentations on the Pacific coast and determine what constitutes a bay with an arbitrary formula based on the assumption that a bay must be deeper than it is wide is to make the geography of one coast dominate the human necessities of people on other coasts. Given the wide range of choice which the United States has in determining what constitutes a bay, it is indefensible to deprive one part of the country of the valuable asset of bays (inland waters under their exclusive control) because the configuration of one coastline produces a different type of bay than is found elsewhere.

The channels between the California mainland and the off-lying islands also have special importance because of

geographical conditions. As the Summary of the Testimony of Typical Witnesses shows in detail, these offshore channels constitute sheltered inland passages.[25] The testimony of these witnesses who have had practical experience in navigation in this area also shows that the water outside these channels may be rough and dangerous.[26] It is the existence and special characteristics of these sheltered areas —and not any arbitrary distance between islands—which should be a determining factor in the location of the outer limits of inland waters.

The amount of shelter is the component of a number of different weather and water factors, including wind, temperature, tides and wave action. All of these factors are completely excluded from consideration under the method proposed by Plaintiff. Yet each of them may have a bearing on whether any given indentation or channel could afford shelter or port facilities and therefore should be determined to be within inland waters.

The proximity of neighboring nations is another factor in which the sharp geographical variance from nation to nation ought to be taken into consideration in determining the boundaries of the marginal sea. Where a nation has maritime neighbors only a short distance across an ocean or other body of water, sound diplomacy may dictate that the nation make a modest claim as to the outer limits of inland waters to insure that its marginal belt does not encroach on the rights of the neighboring nation. But where there is a vast expanse of ocean between a nation and its maritime neighbors, as is the case of the Coast of California, there is no need for inhibitions in claiming a broad belt of inland waters if that course seems desirable in light of other factors.

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[25] Summary of Testimony of Typical Witnesses, pp. 214-278.

[26] Ibid., pp. 229, 238.

Law Enforcement.

Attention should be given in determining the location of the marginal belt to the effect it will have on the apprehension of law violators. The offshore area has traditionally played a vital role in attempts to smuggle narcotics, aliens, and liquor into this country. Law-enforcement officials would be aided in minimizing such smuggling if the high seas are pushed far from the mainland by a broad belt of inland waters. The method proposed by plaintiff, however, would not enable the Court to take this fact into consideration in fixing the outer limits of inland waters.

The importance of the location of the marginal belt to effective law enforcement is demonstrated by the three decisions which will be cited in the following section to show the historical usage of Monterey, Santa Monica and San Pedro Bays. (*Ocean Industries* v. *Superior Court,* 200 Cal. 235; 252 Pac. 722; *People* v. *Stralla,* 14 Cal. 2d 617; 96 Pac. 2d 941; *United States* v. *Carrillo,* 13 F. Supp. 121 (S. D. Cal. 1935).) In each of those cases, the issue was whether a certain ship was within the regulatory jurisdiction of the State or Nation. Two of the cases involved gambling ships and the third involved an illegal fishing vessel. If a narrow belt of inland waters is established, the adjoining state will be powerless to regulate these and other harmful activities in the areas close to its shores.

Historical Usage.

The lone exception to the Plaintiff's complete reliance on the mathematical formula in locating the marginal belt is in the matter of historical usage. The Master's Report states that in determining whether particular segments are bays or harbors constituting inland waters,

> "The United States recognizes that allowances may have to be made for 'existing agreements and historic situations,' but it contends that the burden of establishing such exceptions should be upon California."

The making of such an exception was virtually compelled by the precedents recognizing historical usage. The distinguished tribunal in the North Atlantic Coast Fisheries Arbitration referred to the concept of the "historic bay". (1 North Atlantic Coast Fisheries Arbitration 95.) The proposal of the American delegation at the Hague Conference made provision for the recognition of historical usage. Similar recognition was made in Institute of International Law in 1894.[27] and the International Law Association in 1895.[28] In the Anglo-Norwegian Fisheries case now pending before the International Court of Justice, Great Britain is conceding that an exception to the rigid system it proposes must be made for historic bays. (Memorial of the United Kingdom, ¶ 75.)

Each one of the five bays in issue in this proceeding has long been recognized and used as a bay. They have been considered and accepted as bays both officially and in a popular or general sense. A summary of the evidence showing the long and consistent recognition and use of these water areas as bays is contained in the testimony of John W. Caughey which will be found in the Summary of Testimony of Typical Witnesses, segregated in accordance with each of the various bays. The importance of this general acceptance is indicated by the holding of the tribunal in the North Atlantic Coast Fisheries Arbitration, that the term bay should "be interpreted in a general sense as applying to every bay * * * that might be reasonably supposed to have been considered as a bay . . . " (1 North Atlantic Coast Arbitration, p. 92.)

Three of the five bays—San Pedro, Santa Monica and Monterey—were discovered by Cabrillo in 1542 and were designated by him as bays. All three of these bays were again designated and recognized as bays by Vizcaino in 1602. These bays have been continuously recognized as

[27] Article 3 of 1894 draft (13 Annuaire, p. 329).

[28] Article 3 of 1895 draft (Report of 17 Conference, p. 109).

such by all navigators and extensively used for commercial purposes under three sovereigns—Spain, Mexico, and the United States. It is doubtful if there is any bay on the Atlantic Coast, with the single exception of the approach to the James River, that has as long and continuous recognition and use as these three Pacific Coast bays. Moreover each of the three bays mentioned has been the subject of a Court decision which establishes beyond all doubt that they are historic bays.

Monterey Bay. Monterey Bay was the subject of a decition of the California Supreme Court in *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722 (1927). In this decision the Court was called upon to construe the provision of the California Constitution stating that "all the lands, harbors, and bays in and adjacent to the coast," are included within the boundaries of the state. The particular issue was whether a certain vessel named "Peralta" was within a "bay" as used in this Constitutional provision when it was conducting fishing operations three and one-half miles off the shore in the indentation between the cities of Monterey and Santa Cruz.

This opinion begins its discussion of this issue by stating that Monterey Bay was discovered in 1542 by Juan Cabrillo, the "bold navigator" who was the first to sail north of Lower California. It fell to Sebastian Viscaino, another Spanish navigator, to take formal possession of the coasts of the bay in 1602 and christen it Monterey Bay. After pointing out that the body of water "satisfies the definition of a 'bay' given by the lexicographers," the Court then traced the history of the bay from Spanish through Mexican to American control. The Court concluded that the body of water between the headlands at the cities of Santa Cruz and Monterey is a "bay" and therefore within the jurisdiction of California. The opinion contains such a careful analysis of the facts which make the indentation a bay constituting inland waters that a long excerpt from the decision has been set forth in Appendix A.

Other authorities have considered Monterey Bay a classic example of a bay constituting inland waters. In a debate in the Senate in 1852, Senator (later Secretary of State) Seward argued that an arbitrary 6-mile rule for determining the outer limits of inland waters was undesirable because it "would surrender the Bay of Monterey". (Cited in 9 North Atlantic Coast Fisheries Arbitration 173.) The Counter Memorial of Norway in the Anglo-Norwegian Fisheries case now pending before the International Court of Justice cites Monterey Bay as an example of an indentation within the exclusive jurisdiction of the United States.

Santa Monica Bay. Santa Monica Bay was the subject of the decision of the California Supreme Court in *People* v. *Stralla,* 14 C. 2d 617, 96 Pac. 2d 941 (1939). The issue in that case was whether the gambling ship Rex was within the jurisdiction of California when it was anchored four miles seaward from the City of Santa Monica. As mentioned above, under the California Constitution, the state's jurisdiction extends to bays. Consequently, the Court said that the issue posed three questions: "Is this body of water a bay geographically? Is it a bay historically? Is it a bay legally?"

After reviewing the various definitions of a bay, the Court concluded that the body of water was a bay geographically. The historical case, the Court found to be even stronger.[29] Explorers Cabrillo and Viscaino, said the Court, identified the body of water as a bay in their voyages in 1542 and 1602, respectively. Histories, atlases and the United States Coast Pilot referred to it as a bay. Harbor works were constructed in the indentations and there was a long fight over whether San Pedro or Santa Monica Bay

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[29] In connection with the historical usage of this bay, we refer the Court particularly to testimony of A. G. Johnson because, through inadvertence, this testimony was not summarized in the Master's Report. See Summary of Testimony of Typical Witnesses, pp. 336-343.

should be developed as the Port of Los Angeles. The discussion of the Court in this case is of such pertinence that a long excerpt from the opinion is set out in Appendix A. It is appropriate here, however, to quote the conclusion reached by the Court after its careful examination:

> "We conclude that geographically the waters known as Santa Monica Bay conform to the definition of a bay; that historically for a period of at least 400 years they have been known as a bay and during a large portion of that period have been used as a harbor; that the claimed jurisdiction of the executive department of the state is in conformity with the law of nations; therefore, that Santa Monica Bay is one of the bays and harbors included within the territorial boundaries of the state by the Constitution."

San Pedro Bay. San Pedro Bay was the subject of the decision of the United States District Court in *United States* v. *Carrillo,* 13 F. Supp. 121 (S. D. Cal., 1935). This case involved the indictment of Carrillo and others for committing acts of piracy and robbery on the gambling ship Monte Carlo, anchored off the coast from San Pedro. A motion to dismiss all counts of the indictment required the Court to determine whether the ship was within the territorial jurisdiction of California and the United States.

The Court pointed out that under the California Constitution and the practices of nations, the jurisdiction of the State and Nation extends three miles seaward from a line joining the headlands of bays. The Court was thus called upon to determine whether the body of water in question was a bay. After a "consultation of old discovery and navigation maps of the Spaniards and as well the English," and a review of Atlases and geographical data, the Court decided that,

> " . . . the Bay of San Pedro is that body of water lying landward from a line drawn from Point Lasuen to Point Fermin . . . "

California believes that this decision is so relevant to the issues in this proceeding that a long excerpt from the opinion has been set out in Appendix A.

In describing San Pedro Bay in the Carrillo case, Judge Stephens said that it was,

> " . . . that portion of the Pacific Ocean lying between the bluffs, now the site of the City of Huntington Beach, and until lately called Point Lasuen, on the east and Point Fermin on the West."

The location of Point Fermin is not in dispute. Moreover, it cannot be disputed that San Pedro Bay extends to Point Lasuen. But California believes that in referring to Point Lasuen as being "the bluffs, now the site of the City of Huntington Beach," Judge Stephens made an error which though immaterial in the case before him is important in these proceedings. California believes that an examination of the coastline, the charts of United States Geodetic Service, and other official sources, would show that there is no point at or near Huntington Beach, and that Point Lasuen was and is a point at Newport Beach just west of the entrance to Newport Bay.

The correct location of Point Lasuen, however, is a complex question of fact. It involves the consideration of a large amount of documentary evidence and testimony as to physical conditions of the shoreline which it would be difficult, if not impossible, to set forth in proper detail in this brief. Because of the importance of correctly locating this point, which has always been regarded as the easterly headland of San Pedro Bay, we believe we should set forth here briefly a summary of the elements of this problem.

The dispute as to the location of Point Lasuen in no way affects the validity of Judge Stephens' decision that San Pedro Bay extends from Point Fermin to Point Lasuen. The precise location of Point Lasuen was not an issue in the Carrillo case, and the decision of the Court would have been the same whether Point Lasuen was located at Huntington Beach or at Newport Beach. The Court found that

the alleged offense was "within the territory of California" because it was committed within three miles of the line drawn from Point Fermin to Huntington Beach. If the line had been drawn from Point Fermin to Newport Bay, the territorial waters would have extended even further seaward and the result in the case would have been the same.

An examination of the authorities referred to in the Court's decision in support of the statement that Point Lasuen is located at "the bluffs, now the site of the City of Huntington Beach" will show that the Court did not make any exhaustive examination of the evidence of the location of Point Lasuen. The first authority cited, "The Pacific Coast Pilot," 1889, contained no map of San Pedro Bay. It does contain a mileage calculation which, if followed, would place Point Lasuen some distance westward of Newport Bay. However, the next authority cited is U. S. C. & G. S. Chart No. 5101, dated February, 1933, which does not contain any reference whatever to Point Lasuen and furnishes no support for the statement that Point Lasuen is at Huntington Beach. The Chart does show a point at Newport Beach, but the words Point Lasuen are not printed at any place.

Thompson's Atlas of 1814, the next authority cited, squarely contradicts the Court's statement by designating Point Lasuen exactly at the point near Newport Bay, as claimed by California. Rand-McNally's Atlas of 1878 likewise specifically designates Point Lasuen at the Newport Beach point claimed by California. The 1899 edition of this Atlas does not contain the words Point Lasuen at any place. These maps, therefore, while they support the Court's finding that Point Lasuen is the easterly point of San Pedro Bay, also support California's contention that that point is the point which actually exists at Newport Beach and not the low bluffs at the site of the City of Huntington Beach.

The first record historically of Point Lasuen is the so-called Vancouver chart, which was referred to by the Court.

This chart was made by George Vancouver in 1793. A facsimile of the map showing Pt. Lasuen to be the eastern headland of San Pedro Bay is shown as the first map following this page.

The first official United States chart of San Pedro Bay was made by the U. S. Coast Survey in 1853. This chart (No. 601) was revised from time to time down to 1882. This chart and every revision shows that Point Lasuen is at Newport Beach, sometimes called Newport Landing. The 1853 chart of San Pedro Bay, revised to 1878, is reproduced in facsimile as the second map following this page. The words "San Pedro Bay" and "Pt. Lasuen" are exactly as they appear on the original chart. This chart indicates that San Pedro Bay extends to Point Lasuen and that the Point is at Newport Landing. Superimposed on this map are the dash line from Pt. Fermin to Pt. Lasuen and the dotted line from Pt. Fermin to the bluffs at Huntington Beach.

The fact that Pt. Lasuen is at Newport Beach is borne out by various other maps. Among these are a detailed hydrographic survey of this entire coast line made by the U. S. Coast and Geodetic Survey in 1878 and the map issued by the General Land Office, dated 1913, which was "compiled from official records." Another U. S. Coast and Geodetic Survey chart which also shows with great clearness the precise location of Pt. Lasuen at Newport Beach was used in March 1897 to accompany the minority report of the Deep Water Harbor Board, Senate Document 18, 55th Congress, 1st Session. (See third map following this page.) In this report both majority and minority recognized that Pt. Lasuen is the easterly headland of San Pedro Bay.

This long official recognition of the Newport Beach location as the true Point Lasuen would seem to be conclusive and to control over any uncertainty that may have existed as to Vancouver's original intentions.

San Luis Obispo Bay. This bay was first designated and described by the Spanish explorer, Sebastian Viscaino, in

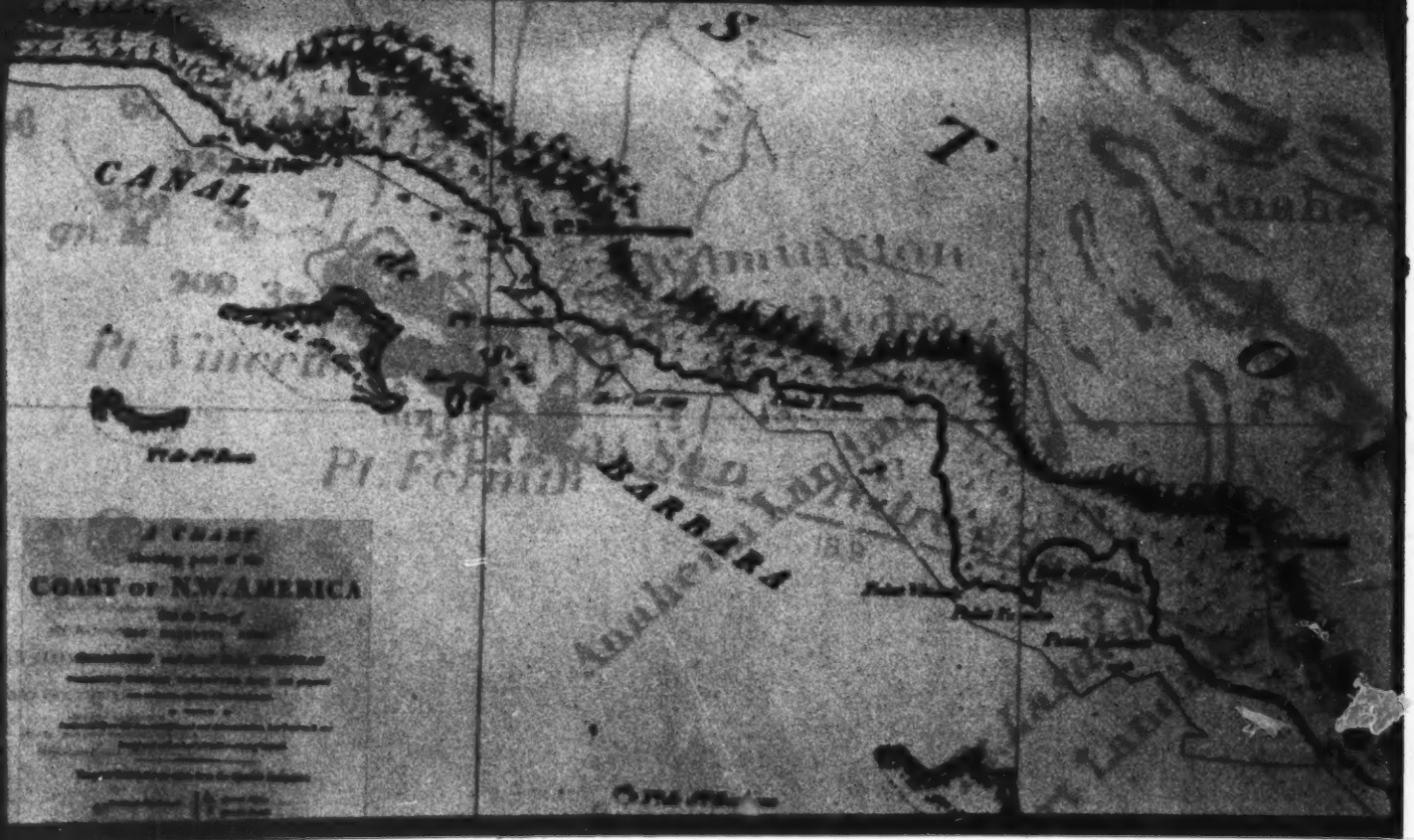
1602. After the San Luis Obispo mission was founded in 1772, the bay was in regular use by Spanish ships which carried passengers and supplied the mission. Vancouver's map shows the tracks of his ship in the bay in 1793, and by the middle of the Nineteenth century, coastwise steamers and schooners were making regular calls. Through the later half of the Nineteenth century, the city of San Luis Obispo was almost entirely dependent on the Bay for its connection with the outside world. During that period, large quantities of grain, lumber, rock, and general merchandise were shipped by water in and out of the Bay. (See Summary of Testimony of Typical Witnesses, pp. 345-351, 354-355.)

The Bay continues to play an important part in the commercial life of the area. The port at Avila is a major exporter of petroleum. Harbor improvements exceed more than a million dollars in value. A substantial fishing fleet operates out of the Bay. (Summary of Testimony of Typical Witnesses, pp. 352-353.)

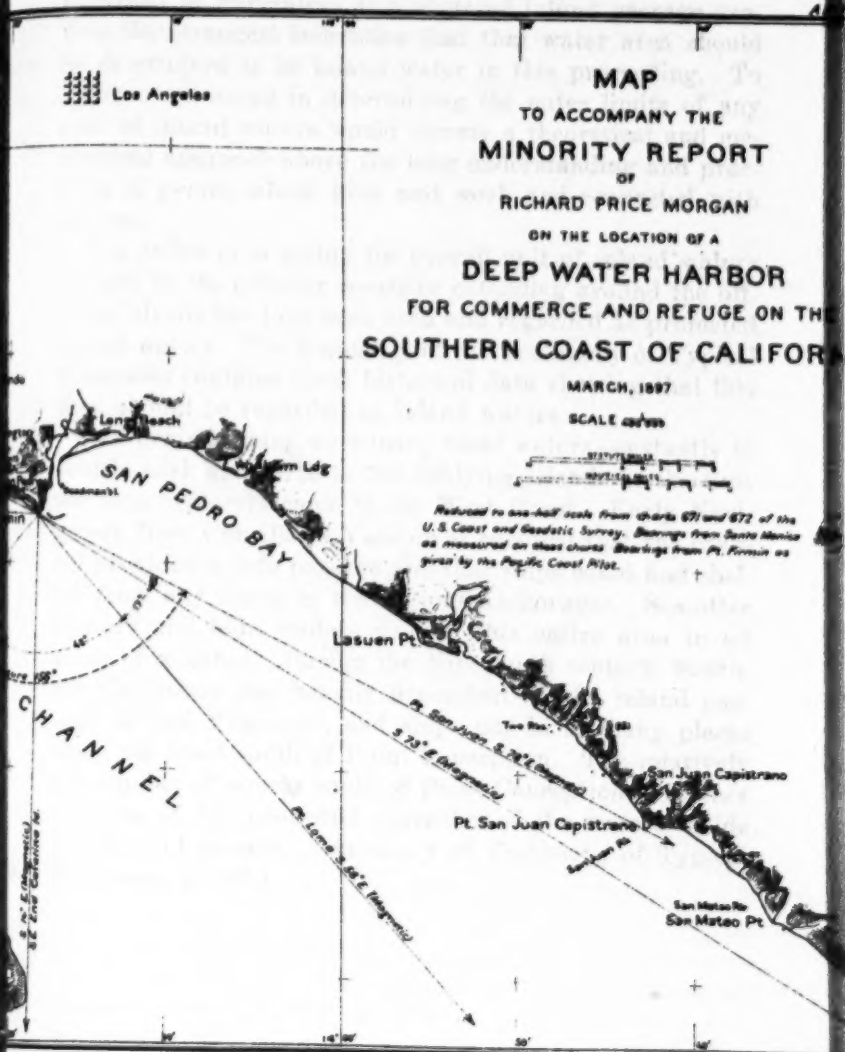
Cresent City Bay. This sheltered body of water has been continuously used as a bay since it was discovered in 1850 by Douglas Ottinger. During the 1850's, supplies and materials for the gold mines in the interior flowed into the Bay. Soon thereafter, steamers and sailing vessels made regular calls at the Port. A wharf was built during this period and a breakwater was constructed in 1925. (Testimony of Typical Witnesses, pp. 388, 391-394.)

Since the Cresent City still has no railroad connection, the Bay continues to play a vital role in the life of the community. The fishing industry is the major source of maritime commerce. Lumber shipments are also substantial. (Summary of Testimony of Typical Witnesses, p. 397.)

Channels. While Plaintiff's concession as to the importance of historical usage was made with respect only to bays and harbors, it is clear that historical data must be taken into consideration in determining the status of chan-


CANAL
BARBARA
COAST of N.W. AMERICA

Wilmington
Old San Pedro
Pt. Vincent
Pt. Fermin
San Pedro Bay
Anaheim Landing
Pt. Lasuen
Anahei
5.3
18.9
U. S. COAST SURVEY
RN COAST OF THE UNITED STATES
SAN FRANCISCO to SAN DIEGO


Los Angeles
MAP
TO ACCOMPANY THE
MINORITY REPORT
OF
RICHARD PRICE MORGAN
ON THE LOCATION OF A
DEEP WATER HARBOR
FOR COMMERCE AND REFUGE ON THE
SOUTHERN COAST OF CALIFORNIA
MARCH, 1897
SCALE
Reduced to one-half scale from charts 671 and 672 of the U. S. Coast and Geodetic Survey. Bearings from Santa Monica as measured on these charts. Bearings from Pt. Firmin as given by the Pacific Coast Pilot.
SAN PEDRO BAY
CHANNEL
Lasuen Pt.
Pt. San Juan S. 75° E (Magnetic)
Pt. Loma S. 66° E (Magnetic)
Pt. San Juan Capistrano
San Juan Capistrano
San Mateo Pt.
San Mateo Rk

nels as well. Facts showing that a channel has long been regarded by navigators as a shetered inland passage provide the strongest indication that that water area should be determined to be inland water in this proceeding. To ignore such usage in determining the outer limits of any part of inland waters would elevate a theoretical and mechanical approach above the long understanding and practices of people whose lives and work and connected with the sea.

The entire area within the overall unit of inland waters formed by the exterior coastline extending around the off-lying islands has long been used and regarded as protected inland waters. The Summary of the Testimony of Typical Witnesses contains much historical data showing that this area should be regarded as inland waters.

California Indians were using these waters constantly to shuttle back and forth to the off-lying islands at the time the first explorers came to the West Coast. Early Navigators from Cabrillo to Vancouver certified that the channel provided a safe passage and that ships could find shelter from any storm in the various anchorages. Sea-otter hunters and hide traders worked this entire area in all kinds of weather. During the Nineteenth century, Southern California was heavily dependent on the inland passage to San Francisco, and ships put in at many places along the coast south of Point Conception. The relatively low number of wrecks south of Point Conception is further evidence of the protected character of the waters inside the chain of islands. (Summary of Testimony of Typical Witnesses, p. 185.)

III. THE BASELINE OF THE MARGINAL SEA SHOULD BE DETERMINED ON THE BASIS OF THE PRESENT LOWER LOW WATER MARK.

The third of the issues presented in the Master's Report is,

> "By what criteria is 'the ordinary low-water mark on the Coast of California' to be ascertained."

As previously pointed out, the location of the ordinary low water mark is pertinent only (i) where the shore confronts the open sea and there are no bays, channels, or other inland waters, and (ii) and where the line marking the seaward limit of inland waters touches the headlands at the entrance of a bay or where it touches the outer shore of the islands in case of channels. If California's contentions regarding its bays and channels are upheld, the low water mark will have to be fixed only at the latter points. In any event, however, it may be important to know by what criteria the "ordinary low water mark is to be ascertained."

There are two important preliminary questions which must be discussed before we can examine the question as to what criteria should be used to determine the ordinary low water mark. The first preliminary question is raised by Plaintiff's contention that, "where artificial changes have occurred in the shoreline since 1850, the low water mark should be determined as of the date the change was effected." (Master's Report, p. 30.) In short, the United States views the marginal sea as a fixed and rigid belt which must be determined once and for all on the basis of conditions and circumstances of the shore line in 1850.[30] California, on the other hand, believes that present conditions in the shoreline areas must govern in the determination of the boundaries of the marginal sea.

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[30] The parties have agreed that at places where the only change in the shoreline is due to gradual accretions or relictions which are entirely natural, the marginal belt should be determined on the basis of present conditions. (Master's Report, p. 30).

A. The Low Water Mark Should Be Determined on the Basis of Present Conditions in the Shoreline Areas.

In the century since California was admitted to the Union, man and nature have brought many changes in the coast line of California. Large areas of beach have been filled to provide recreational facilities. Highways, railroads and commercial structures have been built on land reclaimed from the ocean by filling. Harbors have been developed to accommodate a large volume of commercial and naval vessels by the erection of breakwaters and piers. In some places, the shore line has been extended seaward by accretions formed by gradual and imperceptible degrees but brought about by artificial structures such as piers and wharves. These changes in the shore line of California reflect the rapid industrial development and general advancement of the State since 1850.

In these proceedings, the United States is claiming that all land which has been added to the shoreline during California's development in the last century, by filling or by accretions that are not entirely natural, must be included in the marginal belt. This contention reveals what appears to be an unwillingness on the part of the Plaintiff to give full effect to the rationale and the language of the *California* decision. Moreover, we shall show that in making its argument, the United States is disregarding the expressed intentions and prior assurances of the President and other Government officials.

In enunciating the paramount rights of the United States in the marginal sea in the *California* case, the Court squarely placed the decision on the ground that control of *that water area* is essential to the fulfillment of the Federal Government's responsibilities in matters of national external sovereignty. As described by the Supreme Court, these responsibilities fall into the following three categories:

(1) International relations, as to which the Court said:

". . . whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, *is a question for consideration among nations as such, and not their separate governmental units.*" 332 U. S. at 25.

". . . *What this Government does,* or even what the states do, *anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations.*" 332 U. S. at 35.

". . . The very oil about which the state and nation here contend *might well become the subject of international dispute and settlement.*" 332 U. S. at 33.

(2) World commerce, as to which the Court said:

"The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world." 332 U. S. at 35.

(3) National defense, as to which the Court said:

". . . The three-mile rule is but a recognition of the necessity *that a government next to the sea must be able to protect itself from dangers incident to its location.*" 332 U. S. at 35.

"The ocean, even its three-mile belt, . . . becomes of crucial importance should it ever again become impossible to preserve that peace." 332 U. S. at 35.

This articulated rationale of the *California* decision makes it clear that the United States has paramount rights in the area in which these responsibilities *now* exist, not in the area in which they might have existed in 1850. The area which comprised the marginal sea in 1850 may now contain a substantial amount of dry land, due to gradual accretions and reclaiming operations. Under the Plaintiff's contention, the marginal sea would include this presently dry land.

Plaintiff's contention that the marginal sea includes land which is not at present submerged is incompatible with the Supreme Court's reliance on the international obligations in the marginal sea as a basis for the United States' paramount power. What a nation does on the dry land of its mainland is not "a question for consideration among nations as such" as the Supreme Court said was true in the open sea. Nor is any area which is not now under the ocean likely to become the subject of international disputes or settlements. While the court held that foreign nations have certain rights in the marginal sea, such as the right of innocent passage, it has never been suggested that any similar rights exist in the dry land on the shore of a nation.

The reliance of the Supreme Court on the responsibilities of the United States relating to commerce likewise does not fit the Government's conception of a marginal sea composed partly of dry land. It hardly need be said that ocean vessels do not pass through an area which is no longer submerged.

Nor is the Government's theory consistent with the Supreme Court's reliance on responsibilities of national defense as a basis for the Government's rights in the marginal sea. While the three-mile ocean area may have a special importance to our national security which requires that the State's ownership be ousted in favor of the Federal Government's paramount rights, the area which is now upland clearly does not involve the same considerations as the ocean area. Indeed, if the Government's theory concerning the marginal belt were to be established, there would be a harmful effect on national defense. If land produced by filling or by accretions which are not entirely natural is to be included in the marginal belt, it would necessarily mean that the protective belt of water around the nation would be less than three miles in width and might even disappear entirely.

It is thus apparent that the rationale of the California decision is inconsistent with the Government's contention that the boundaries of the marginal sea are to be deter-

mined as of 1850 and that the marginal sea now includes land which is not submerged now but which was submerged at that time.

The language of the Court in the *California* opinion provides further evidence that low-water mark is not to be determined as of 1850 and that the belt does not include presently dry land. In its opinion, the Court referred to or described the subject matter of the litigation in the following excerpts:

"The Government complaint claims an area extending *three nautical miles from shore.*" (332 U. S. 19, 23, Note 1.)

". . . several thousand square miles of land *under the ocean* off the coast of California." (332 U. S. at 25.)

". . . lands under the marginal *sea.*" (332 U. S. at 29.)

". . . lands under the *ocean.*" (332 U. S. at 31.)

". . . the *ocean area*" (332 U. S. at 31)

". . . in the *seas* next to its shores and within its protective belt . . ." (332 U. S. at 35.)

"The *ocean,* even its three-mile belt . . ." (332 U. S. at 35.)

". . . the soil beneath the *ocean* . . ." (332 U. S. 36.)

". . . lying to the *seaward* [of the low-water mark] in the three mile belt." (332 U. S. at 37)

". . . the three-mile belt under the *ocean.*" (332 U. S. at 38)

". . . the bed of the *sea* . . ." (332 U. S. at 38.)

". . . the Federal Government rather than the state has paramount rights in and power over that [marginal] belt, an incident to which is full dominion over the resources of the soil *under that water area,* including oil." (332 U. S. at 38.)

". . . in *this ocean area* . . ." (332 U. S. at 40)

In each of these 13 excerpts, the Court made it clear that the area in which the United States was held to have paramount power is a submerged area of the ocean. None of the excerpts give any indication that the boundaries of

the area are to be determined at any time other than the present. The excerpts emphasize what a study of the rationale of the decision made clear: the marginal sea does not include any land which is not submerged at any given time, whether now or in the future, when the area of the marginal sea comes into controversy.

Just as the present circumstances in the coast line must govern in determining low-water mark, so the present conditions in the harbor areas must be controlling in determining the seaward limits of inland water. Harbor improvements which have been completed in the century since California was admitted to the Union cannot be ignored in the determination of the boundaries of the marginal sea. This is simply an application of the settled principle of international law that the marginal sea is measured from the seaward extremity of the harbor works.

Any other rule would produce results which would not be in the best interests of the United States. Harbor improvements, such as the breakwater at Long Beach, were constructed only after the approval of United States officials and they were often erected at least in part through the use of federal funds.[31] To hold that those improvements are in the marginal sea would, as the Supreme Court said, make them the proper subject for international disputes and settlements.

Reference to the concept of the "historic bay" emphasizes that present conditions, not those of 1850, must be controlling in determining the limits of inland water. Since the status of a bay as inland waters depends in part on custom and usage, it is clear that it would be inaccurate to regard seaward limit of a bay as a rigid line which would be finally determined on the basis of conditions in 1850. On the contrary, the concept of the historic bay which depends on custom and usage shows that certain bays may have be-

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[31] 33 U. S. C. A. § 541; See e.g. Act of March 3, 1925 (43 Stat. ch. 467); and see Answer of State of California, No. 12 Original, 1945 Term, p. 187-193.

come established as inland waters between 1850 and the present date. This fact makes apparent the necessity for examining present conditions in determining the limits of inland waters.

The principles of the *California* case were extended and applied in *United States* v. *Louisiana*, 339 U. S. 699 (1950) and *United States* v. *Texas*, 339 U. S. 707 (1950). Those cases provide further evidence that the boundaries of the marginal sea must be determined in light of the conditions and circumstances prevailing at present in the coastal area, rather than on the basis of 1850 conditions.

In the *Texas* case, the Court said that the marginal belt was part of the "international domain." (339 U. S. at 719). If the Court were to hold that harbor works or additions to the coast line since 1850 are part of the marginal belt, those improvements would be part of the "international domain." Such a result would clearly be deleterious to the interests and security of the United States.

The decrees in the *Louisiana* and *Texas* cases provide that the paramount power of the United States extends to "the lands, minerals and other things underlying the Gulf of Mexico, *lying seaward of ordinary low water mark* . . ." This again emphasizes the fact that the marginal belt does not include any land which is not now submerged.

In asserting that changes and improvements in the shore line which have occurred since 1850 are to be regarded as in the marginal belt and thus under the federal paramount power, the United States is disregarding the assurances of the President and other government officials. Testifying in 1946 before the Senate Judiciary Committee on the so-called quitclaim bills, the then Secretary of Interior Ickes said:

> "Structures, such as docks or piers, which may have been erected on the submerged lands and the *surface ownership of filled-in areas* should not be disturbed if

they were erected or filled in accordance with the Federal or State law." (Hearings, Senate Judiciary Committee, on S.J. Res. 48 and H.J. Res. 225, 79th Cong., 2d Sess., pp. 10-11.)

The brief for the United States in support of the motion for judgment in this case quoted the above statement by Secretary Ickes (p. 145) in discussing a recognition of the equities in the offshore area. The Government's closing brief stated that the President had authorized the Attorney General to say that there was no desire on the part of the Government to confiscate or destroy bona fide investments or improvements in the coastal areas. That same thought was expressed in oral argument by the Attorney General with the sanction of the President. (Tr. p. 24.)

In spite of these clear assurances, the United States is now contending that improvements and investments on filled lands made in reliance on state ownership are now subject to the paramount power of the United States. A just result, and one that would be consistent with the Court's decisions and the prior promises of Government officials, would be reached by determining the boundaries of the marginal sea on the basis of present conditions prevailing in the shore line areas.

B. Even Assuming Solely for the Purposes of Argument That 1850 Conditions Must Be Considered in Determining the Boundaries of the Marginal Belt, Accretions on the California Shore Line Formed by Slow and Imperceptible Degrees but Caused by Man-Made Structures Should Not Be Included in the Marginal Sea.

The second preliminary question is raised by Plaintiff's assertion that the Court must decide "whether the California rule that accretions artificially induced do not accrue to the adjoining landowner or the Federal rule that such accretions do accrue to the owner of adjoining land is to be applied." (Master's Report, p. 30) As shown above, it is the position of California that the marginal sea does not include any of the shore-line area which is not presently submerged and that the boundaries of the marginal sea must be determined on the basis of present conditions in the shore-line area. Consequently, California believes that there is no occasion for choosing between the Federal and California rules on accretions.

Assuming, however, solely for the purposes of argument that the marginal sea does extend to land which is not presently submerged, California believes that the Court should adopt the federal rule that accretions formed by gradual and imperceptible degrees even though induced by artificial structures accrue to the owner of the adjoining land.

The basis of the federal rule is the common law principle that natural accretions belong to the riparian or upland owner, while artificial accretions do not. Under the federal rule, accretions formed by slow and imperceptible degrees are held to be natural and not artificial even though the impelling cause is the erection of some artificial structure or some other work of man. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66-69. The federal view that such accretions are natural and not artificial reflects the English common law rule to that effect. *Brighton and Hove Gen-*

eral Gas Co. v. *Hove Bungalows Ltd.* (1924), 1 Ch. 372, 381, 383-390, *Doe* v. *East India Company* (1856), 10 Moore P.C.C. 140, 14 Eng. Reprint 445. States other than California have generally taken the same view as the federal courts. See e.g., *Burke* v. *Commonwealth* (Mass. 1933), 186 N.E. 277, 279; *Hanson* v. *Thorton* (Ore. 1919), 179 Pac. 494, 496; *Tatum* v. *City of St. Louis* (Mo. 1894), 28 S.W. 1002, 1003.

California courts have carved out a narrow exception to this view of the federal courts, the English common law, and the majority of American state courts. In the special circumstances where there is a controversy between an upland owner and the State of California or its grantee, it is held that accretions formed by gradual and imperceptible degrees but indirectly caused by a man-made structure are "artificial" and hence do not belong to the upland or riparian owner. *Carpenter* v. *City of Santa Monica*, 63 Cal. App. 2d. 722 (1944).

There are ample reasons why this exceptional California view should not be extended and applied in determining the boundaries of the marginal sea off California. As pointed out above, the California rule is contrary to that adopted by the courts of most other states. Consequently, if state law is to be applied in determining the boundaries of the marginal sea, there would be a different result in different states. In view of the international importance of a nation's policy with regard to the width of this belt, it would seem especially undesirable for the United States not to have a consistent policy concerning its boundaries. Since the limits of the marginal sea are a national problem arising all along this country's ocean boundary, the application of the uniform federal rule would seem preferable.

Moreover, the considerations in this proceeding between California and the United States concerning the limits of the marginal sea are substantially different from those involved in the controversy between the State and an upland owner in the case where the exceptional California rule was

enunciated. The California rule was adopted to enable municipalities to improve their harbor areas without having to condemn the accreted areas and to protect the interest of California citizens in the tidelands (held in trust for them by the State). *Carpenter* v. *City of Santa Monica*, 63 C. A. 2d at 794. Application of the California exception in the present proceedings would not serve the purposes for which it was created. Here, the California rule would be destructive, rather than protective, of the interests of California citizens and municipalities in the tidelands. Consequently, it would seem improper to apply in this proceeding the California rule which was devised for application in substantially different circumstances.

C. Lower Low Water Mark Should Govern in the Determination of the Baseline.

We now come to the question as to what criteria are to be used in determining the ordinary low water mark on the coast line of California.

A problem exists in California which does not exist on all shores, namely, that there are two low tides daily—a "lower low tide" and a "higher low tide." In many places, especially where there is a gently-sloping beach, the distance between the lower low water mark and the higher low water mark is substantial and may in some cases involve very valuable property.

Plaintiff takes the position that the phrase "ordinary low water", as used in the Court's decree, must be interpreted as the mean or average of all the low waters to be established by the United States Coast and Geodetic Survey from observations made over a period of 18.6 years. California is in agreement that the 18.6 year period is a proper period for determining correctly the average of the low waters. But California also maintains that there is no authority in the United States, and no rule of international law, which requires that low water mark be interpreted as

meaning the average of all the low tides. California maintains that the United States is free to use as its base line the average of the *lower* low waters rather than the average of all the low waters, and that it will be in the national interest to place the low water mark as far seaward as possible.

In support of its position, the United States relies wholly upon the decision of the Supreme Court in *Borax, Ltd.*, v. *Los Angeles*, 296 U. S. 10, 26-27. This case involved the construction of a federal patent covering a small island in the "inner bay of San Pedro." The court held that for the purpose of construing a federal patent to a private individual, the court will, in the absence of other criteria, follow the common law rule in locating a boundary which borders on a bay or on the sea. The court held that where

> "the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails."

The court interpreted the common law rule as meaning that the "ordinary high water mark" means "a mean of all the high tides."

In California there are two high tides daily—higher high tide and the lower high tide—just as there are two low tides. In the *Borax* case all the *high tides* were averaged to determine the "ordinary high water mark." Plaintiff urges that from this holding it must follow that the average of all the *low tides* must be used in determining the base line of the marginal sea. California maintains that this is a *non sequitur*.

The question of locating the base line of the marginal sea along the open coast is, as we have shown, a question of policy which involves the determination of the political frontier of the United States. This question is certainly not controlled by a decision which involved a land grant to a private individual. On the contrary the United States may choose any criteria for determining its low water mark that

it deems to be in its best interests. This choice that will have to be made by the political branches of our government or by this court, if it should decide to perform this function.

In making this choice, the United States is not bound by any international precedent. The practices of other nations regarding this question are widely divergent. Many nations use the line of their lowest low waters as the base line of the marginal belt (See Citation of Documents, pp. 131, 203, 314). The "basis of discussion" at the Hague Conference of 1930 contains the following comment on low water:

> "The terms 'low water' and 'low tide', as used in this Convention, mean the low water base-line which is employed by the coastal State for the particular coast, whether it be the line of mean low water, the line of lower low water, the line of mean low water spring-tides, or some other similar line of reference."

This emphasizes that each nation may adopt its own definition or criterion for low water and the one that it adopts shall be accepted as the base line.

While as above stated the United States has not officially adopted any criteria, it has uniformly followed the practice of using the mean of the *lower* low waters as the datum for its hydrographic surveys. (Summary of Testimony of Typical Witnesses, pp. 205-208.) In all official hydrographic surveys, the depth of the water is given in the number of fathoms below the mean of the lower low waters. Since these are the charts used for navigation, it would seem logical that the marginal sea should be measured from the same line. The Summary of Testimony also shows that the mean of the lower low waters is used as the datum by the Corps of Engineers for the construction of harbor works and similar purposes. (p. 205)

It is therefore California's position that it will be in the national interest to adopt the mean of the lower low

waters as the criterion to be used in this case for determining the base line of the marginal sea.

IV. A HEARING IS NECESSARY TO DETERMINE THE LOCATION OF THE MARGINAL BELT.

The two preliminary references to the Special Master in this proceeding have now been completed by the filing of his reports. These references comprehend, generally speaking, (1) the ascertainment of the segments as to which the lines should be determined at this time, and (2) a report as to the issues presented, with a statement of the positions of the respective parties and the nature and form of the evidence by means of which they propose to establish proof of their positions. California believes that the time is now here, if indeed it is not long overdue, when it should be accorded a hearing.

California's request for a hearing does not stem from any desire for delay. From the day of the filing of plaintiff's motion for a supplemental decree fixing the baseline of the marginal belt, California sought a reference to a Special Master and requested a trial or a hearing at which evidence might be adduced on the important issues involved in this case. This request for its day in Court has been made in every brief and paper which California has filed in this proceeding. This is recognized in the Report of the Special Master (p. 29).

California submits that it has made a forthright and prompt response to every request of the Special Master. At the request of the Master, California summarized the nature of its proposed oral testimony, both expert and factual, and "indicated what is intended to be proved by the many documents to which it proposes to refer."[32] (Mas-

[32] Footnote 3 on page 4 of the Special Master's Report, due no doubt to a typographical error, mistakenly refers to a footnote on page *18* thereof. The footnote referred to appears on page *11* instead.

ter's Report, p. 11). It submitted to the Special Master two volumes which were filed with the Court accompanying his Report: (I) a "Summary of Testimony of Typical Witnesses," of some 400 pages, which also contains the Statement of California in response to the Special Master's letter of June 29, 1949 addressed to counsel for both parties, and other memoranda and comments, and (II), a "Citation of Documents," of some 600 pages, with statements as to what is intended to be proved by them. In addition to these volumes, California has filed "a large number of official charts and maps."

California's effort to comply promptly and fully with all the Special Master's requests reflects its belief that the determination of what constitutes inland waters transcends any mere academic consideration. Plaintiff's opposition to a hearing seems to California to be based on an attempted over-simplification of the important issues involved. We believe that a failure to hold the requested hearings would limit the Court's appreciation of both the local and the international conditions which are affected by the issues in this case. The fact that the Court is here exercising original, not appellate, jurisdiction makes it especially appropriate and necessary for it to grant a full hearing of the evidence.

In maintaining throughout this proceeding that a trial or hearings should be held, California has urged that the hearing be held on the West Coast to enable the Court to gain a full understanding of the geographical, physical and legal background of this case by hearing oral testimony and by visiting the scene. While California has no desire to criticize the Master's Report, the difficulties attending a condensation of even a summary of the testimony of typical witnesses are apparent.

There is precedent in international law for a visit to the scene by the Justices of this Court. In 1909, a visit to the scene was made by a Tribunal of the Permanent Court of Arbitration in the *Grisbadorna Case*, a water-boundary

case between Norway and Sweden,[33] and in 1937, the Permanent Court of International Justice made a visit to the scene in the *Diversion of the Waters of the Meuse Case* between the Netherlands and Belgium.[34] Such a visit would produce a firsthand impression and an understanding of the problems involved in this case which not atlas, no map, no chart would impart.

No definite recommendations upon the subject of a trial or hearings are contained in the Master's Report. If the Court rejects California's argument that the question before the Court is political and not justiciable, California urgently requests the Court to grant a trial or hearings in California for the presentation of evidence in this case, whether it be before a three-judge court, a commission, a special master, or some other form of tribunal.

Respectfully submitted,

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Dated July 31, 1951.

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[33] Scott, Hague Court Reports, p. 121.

[34] 4 Hudson, World Court Reports, p. 172.

APPENDIX A.

Ocean Industries, Inc. v. Superior Court, 200 Cal. 235, 252 Pac. 722.

RICHARDS, J.—

" . . . The preliminary questions thus presented for our solution are, first, as to whether the ship 'Peralta' upon which the petitioner herein is engaged in conducting its aforesaid operations and upon which it intends to continue the same unless prevented from so doing by the preliminary injunction proposed to be issued by the respondents herein, is at its admitted place of anchorage, within or without the boundaries of the state of California; second, whether the aforesaid operations of said petitioner upon said vessel and at said point, if within the boundaries of the state of California, are in violation of its laws. The precise point in issue under the first of these propositions has been made very definite by the presentation on behalf of both of the parties hereto in their pleadings and upon the hearing hereon of certain maps and plats delineating the boundaries and dimensions of the bay of Monterey, as well as the exact location of the ship 'Peralta' within the headlands of said body of water, but more than three nautical miles from low-water mark along the shore line thereof. If it shall be found as a matter of law that the entire area of the bay of Monterey, so called, extends oceanward to a line drawn between the headlands thereof; and if it shall further be found that said entire area of said bay of Monterey is to be held included within the territorial boundaries of the state of California, it would follow irresistably that the ship 'Peralta' at its designated place of anchorage is within said state and is subject to its laws.

(1) Upon the solution of the problem thus presented this court is entitled to bring to bear, in so far as it may be aided thereby, its judicial notice of the political history of the world (Code Civ. Proc., sec. 1875, subd. 8) . . . [W]hen

in the early years of the sixteenth century of our era Spain through her voyagers had discovered and through her conquistadores established her dominion over that region in the southwestern portion of North America which became known as 'New Spain' she began through her viceroys to send forth navigators to the northward along the western coast of the continent, with the twofold object of adding further territory to her domain and of discovering the fabled northwest passage. The first of these navigators to thus extend his voyages beyond what is now known as Lower California was Juan Cabrillo. This bold navigator after a stormy voyage up an unknown coast sighted the wooded headland to which he gave the name of Point Pinos and sailed into the body of water behind it, to which, as recorded in his log, he also gave the name 'Bahia de Los Pinos,' the Bay of Pines. He was followed in 1602 by another navigator, Sebastian Vizcaino, who also found and entered the same incurved body of water upon the inner shores of which he landed, taking formal possession of its coasts in the name of his sovereign and rechristening it 'Bahia de Monterey,' in honor of his patron the Count de Monterey, then viceroy of New Spain, which name it has ever since borne in the official records of Spain, of Mexico, the United States, and state of California.

(2) The bay of Monterey, thus designated from its first discovery as a 'bay,' is a body of water having headlands approximately eighteen miles apart, with receding shores, giving a total width of twenty-two miles inside the headlands, with a total depth of approximately nine miles. It thus satisfies the definition of a 'bay' given by the lexicographers as a body of water around which the land forms a curve; or a recess or inlet between capes or headlands. (Webster, Title 'Bay.') It is needless to detail the history of the increasingly troubled effort of Spain and later of Mexico to assert and maintain the sovereignty of each in turn over the indefinite region known as California and its adjacent islands, inlets, and seas; but the interesting fact

may be noted as having its bearing upon whatever question of international law is involved herein that the dispute between Spain and England in the year 1790 growing out of the northwest coast fur trade was for the time being settled by the so-called Nootka Convention wherein as between these two powers, which were then the greatest maritime powers of the known world, it was agreed that the exclusive sovereignty of Spain should be recognized and respected over all parts of the northwest coast already occupied by subjects of Spain and for a distance of ten leagues into the ocean. The agreements of this convention were ratified by the contracting powers and the claims of Spain to exclusive sovereignty and jurisdiction over the coasts of what is now California and Oregon as far north as the mouth of the Columbia River on land and to a distance of ten leagues into the ocean were conceded and confirmed. This jurisdiction over these coasts and seas and adjacent islands Spain and her successor Mexico thereafter asserted and insisted upon through rigid maritime regulations over the increasing coastal traffic during the half century or so following the date of said treaty and down to the time of the occurrence of the war between the United States and Mexico and consequent seizure of California by the former, manifested by the raising of the American flag at Monterey on July 7, 1846, and by the subsequent events which marked the passing of the old dominion.

(3) By the terms of the treaty of Guadalupe Hidalgo, which was finally ratified at the city of Queretaro on May 30, 1848, Mexico ceded to the United States all territory lying to the northward of a line drawn from the mouth of the Rio Grande westerly to the Pacific Ocean. By virtue of this treaty the United States assumed that jurisdiction over the region thus ceded, both territorial and maritime, which Mexico had theretofore asserted, and which embraced all of the ports, harbors, bays, and inlets along the coast of California and for a considerable though perhaps

indefinite distance into the ocean, including dominion over the numerous islands lying therein adjacent to said coast.

(4) When in the course of events the duly constituted framers of the constitution of California assembled at Monterey in the autumn of 1849 and proceeded to frame the first constitution of California they inserted in article XII thereof a description of the boundaries of the state, which, in so far as the southerly and westerly lines thereof were concerned, read as follows: 'Thence running west and along said boundary line (the Mexican boundary) to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also all the islands, harbors and bays along and adjacent to the coast.' This language in our first constitution, particularly in view of the past political history of the region, would seem to be too clear to admit of any doubt as to its meaning or that it was intended to embrace within the boundaries and jurisdiction of the state of California the entire area of all those several bays and harbors which indent its coast.

* * * * *

(8) The petitioner . . . . insists that by the rules of international law the territorial jurisdiction of a maritime state does not extend beyond three miles from the shore line and follows the indentations of the coast into all bays or gulfs, the headlands of which are more than six miles apart, and cites certain text-writers upon international law in support of that contention. These text-writers give as the reason for this rule the somewhat fantastic one that while our modern international law was in the process of forming, the range of coast planted cannon did not exceed three miles. These text-writers, however, while suggesting such a rule based upon such a long-lost reason admit

that as to the stronger maritime powers of modern Europe the rule was more honored in the breach than in the observance. Britain, which has depended more upon its 'Wooden Walls' than upon its coast ordnance, has always asserted its sovereignty not only over the entire area of the bays, ports, harbors, firths, and other inlets along its much indented coast line, but also over the bays, gulfs, and inlets of its dependencies; such, for example, as the bay of Conception in Newfoundland, which has a breadth of fifteen miles. These text-writers also point out that France has always asserted sovereignty over the bay of Cancale, which is seventeen miles wide at its headlands, and that the United States asserts and has maintained its jurisdiction over the bays of Delaware and Chesapeake, although the former has a headland width of fifteen and the latter of twelve miles. In Moore's Digest of International Law the basis of our assertion of jurisdiction over the entire area of Chesapeake Bay is set forth in its reference to the decision of the Commissioners of Alabama Claims, wherein the extent of that jurisdiction was directly involved. The decision of the commission is illuminating in its bearing upon the instant proceeding. It reads: 'Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English Courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig "Grange" and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and

authority of the Government of the United States.' While it is true that by treaties and conventions between the powers chiefly in arbitration cases the fixation of a six-mile distance between headlands of certain bays and inlets have at times been agreed upon in the settlement of international disputes, it cannot be said that there is any rule of international law upon the subject, the whole matter resting in the undisputed assertion of jurisdiction by the power of possessing the inclosing shore line of the bay or inlet in question.

(9) This being so, we arrive at the conclusion that the bay of Monterey between its headlands and the ocean adjacent to a line drawn between these headlands for a distance of three nautical miles is within the boundaries of the state of California and of the counties respectively of Santa Cruz and Monterey. The particular location of the ship 'Peralta' as given in the petitioner's application herein places it within the county of Santa Cruz and hence within the jurisdiction of the Superior Court in and for said County of Santa Cruz. It is not seriously contended by the petitioner that the acts which it proposes to do upon and by the use of said vessel and its equipment at said point would not, if permitted, constitute a violation of the laws of the state of California regulating the taking and reduction of that species of marine fish known as 'sardines.'

(10) It follows that the Superior Court in and for the County of Santa Cruz has jurisdiction over offenses against these laws; and hence that the alternative writ issued herein should be discharged and the application of the petitioner for a permanent writ of prohibition denied."

Shenk, J., Curtis, J., Seawell, J., Waste, C. J., Langdon, J., and Preston, J., concurred.

People v. Stralla, 14 Cal. 2d 617, 96 Pac. 2d 941.

SHENK, J.—The grand jury of the county of Los Angeles returned an indictment against the defendant Adams and others, charging the violation of subdivision 2, section 337a, of the Penal Code. The specific accusation was the keeping and operating of the gambling ship "Rex" anchored in the waters of what is known as Santa Monica Bay, at a point four miles oceanward from the end of the municipal pier of the city of Santa Monica and approximately six miles landward from a line drawn between the headlands, Point Vicente on the south and Point Dume on the north. The defendant Adams appealed from the judgment of conviction and from the order denying his motion for a new trial.

There is no dispute as to the sufficiency of the evidence to support the jury's verdict if the offense was committed within the jurisdiction of the state. The appeal presents the single question whether the territorial jurisdiction of the State of California extends over the area of the waters known as Santa Monica Bay. If it does, an affirmance of the judgment will be required.

The territorial boundaries of the state were defined in the Constitution of California of 1849, article XII, section 1, which fixed the ocean boundary of the state as: "thence running west . . . to the Pacific Ocean and extending therein three English miles; thence running in a Northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, including all the islands, harbors, and bays along and adjacent to the coast." That language was readopted in the Constitution of 1879, section 1, article XXI, without substantial change. Section 33 of the Political Code enacted in 1872 provides that the sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the Constitution, subject to qualification in cases where jurisdic-

tion has been ceded to or acquired by the United States Government.

[1] The immediate problem for solution is whether the waters commonly known as Santa Monica Bay were intended to be included within the designated territorial boundary. The answer comprehends not one, but several factors, namely: Is this body of water a bay geographically? Is it a bay historically? Is it a bay legally?

For the purpose of considering those factors this court may examine historical data and maps, public papers and records, and may take judicial notice of such geographical, historical and political data even though the same have not been introduced in evidence in the trial court. (Code Civ. Proc., sec. 1875; *Rogers* v. *Cady*, 104 Cal. 288 (38 Pac. 81, 43 Am. St. Rep. 100); *Varcoe* v. *Lee*, 180 Cal. 338, 343 (181 Pac. 223).)

[2] The waters known as Santa Monica Bay lie in an indentation of the California coast between Point Vicente and Point Dume. The points are distant from each other about 25 nautical miles or about 29 statute miles. The line of the coast forms a curve inward to a distance of about ten miles from a line drawn between the headlands. The line of the shore recedes slightly from Rocky Point, which is to the north of Point Vicente, making the distance between shores landward from Point Dume and Rocky Point greater than the distance between those two points. Otherwise the bay is widest between Point Vicente and Point Dume.

The foregoing geographical description appears to conform to the definition of a bay. Funk & Wagnalls New Standard Dictionary defines "bay" as "an indentation in the shoreline of a body of water; the water between two projecting headlands; sometimes, an arm of the sea connecting with the ocean." We find in Webster's International Dictionary: "An inlet of the sea, usually smaller than a gulf, but of the same general character. The name is used, often for large tracts of water, around which the

land forms a curve, or for any recess or inlet between capes or headlands; as the Bay of Biscay; Hudson Bay." The Oxford English Dictionary (1933) gives: "An indentation of the sea into the land with a wide opening." The Encyclopedia Brittanica, eleventh edition: "A wide opening or indentation in a coast line. This may be of the same origin as 'bay', in the architectural sense, or from a Latin word which is seen in the place named Baiae." "A bay is a bending or curving of the shore of a sea or of a lake, and is derived from an Anglo-Saxon word signifying to bow or bend. For a similar reason the word bay is in Latin termed sinus, which expresses a curvature or recess in the coast." (*State* v. *Town of Gilmanton,* 14 N. H. 467, 477.) • • • • •

Historically it appears that both Cabrillo (in 1542) and Viscaino (1603) noted this body of water as "Gran Ensenada" or "Grand Bay" (Bancroft's Works, vol. 18, History of California, vol. 1, 1541-1800, p. 71; Paulen's Atlas of Historical Geography of the United States, plate No. 17). Both Spain and Mexico claimed and exercised exclusive jurisdiction over the waters of this coast as far as the mouth of the Columbia River, for a distance of ten leagues into the ocean, and such claim was confirmed by treaty with Great Britain in 1790. (See *Ocean Industries, Inc.,* v. *Superior Court,* 200 Cal. 235, 242 (252 Pac. 722).)

Historians refer to the waters as Santa Monica Bay (Ingersoll's Century History of Santa Monica Bay Cities, p. 121; Charles Sumner Warren, History of Southern California; California Blue Book, 1932, p. 520). They indicate that the bay received its present name probably earlier than 1827, and that the city of Santa Monica was named later. Rand-McNally & Co.'s Atlas of the World (United States, 1908, p. 277), contains the following statement: "The seacoast of California extends the entire length of the State and is indented by many bays and harbors, that of San Francisco being the finest on the Western coast, nearly fifty miles long and about nine miles wide. Other

bays or harbors of importance are San Diego, San Pedro, Santa Monica, Santa Barbara, San Luis Obispo, Monterey, Tomales, Bodega, and Humboldt."

Before 1872 "Shoo Fly Landing" on Santa Monica Bay afforded shipping facilities for the La Brea rancho. (Ingersoll, Century History of Santa Monica Bay Cities, p. 141.) The same writer, states (pp. 144, 145) that in 1875, in conjunction with the construction of a railroad, a new wharf, 1700 feet in length, reaching a depth of 30 feet at low tide, was completed and the first ship landed at this wharf in June of that year. Collis P. Huntington, about 1892-1893, was instrumental in building the "Long Wharf", 4600 feet, at a cost of about $1,000,000. (Newmark, Sixty Years in Southern California, 1853-1913.) Guinn's Historical and Biographical Record of Southern California (printed 1902, p. 139 et seq.), states facts showing the importance of Santa Monica as a shipping point.

The long struggle to obtain funds to establish a breakwater in either of Santa Monica or San Pedro Bays as a port for Los Angeles, which ended in the selection and establishment of the port in San Pedro Bay, has become part of historical California. (Article "The Battle for Southern Pacific Ports", by Lanier Bartlett, in "Westways", August, 1935, pp. 26-29.)

The defendant quotes the following from the United States Coast Pilot, issued by the United States Department of Commerce under the supervision of the Coast and Geodetic Survey, page 57: "From Point Vicente to Point Dume, about 25 miles, the coast forms a broad open bight about ten miles wide known as Santa Monica Bay". He thus argues that an open bight is not a bay within the accepted terminology of what constitutes a bay. But we are also referred to the statement in the same survey that "Monterey Bay . . . is a broad, open bight, twenty miles long, between Point Pinos and Point Santa Cruz, and nine miles wide . . ." Monterey Bay was determined to be territorial waters in the case of *Ocean Industries, Inc.*, v. *Superior Court*, 200 Cal. 235 (252 Pac. 722).

[3] The defendant contends that a body of water which may answer the definition of a bay, does not constitute a bay unless it also affords protection and safe anchorage to vessels engaged in shipping, and that Santa Monica Bay does not offer the advantages of a harbor. The evidence and the historical facts do not support the statement. The defendant refers to the discussion before the 54th Congress, 1896, as indicating a lack of secure refuge in Santa Monica Bay. But the evidence there produced does not necessarily negative the characteristics of Santa Monica as a bay or a harbor. The controversy centered on the problem of which bay, Santa Monica or San Pedro, was the better site for the project of establishing a port for Los Angeles.

In a history of the Los Angeles Harbor district, compiled by Ella A. Ludwig and published by the Historical Record Company, Inc. (California), referring to the report of the board of engineers appointed to investigate the question of which bay was the more eligible location for such a harbor, it is stated: "There was a lengthy and full comparison of the two places, Santa Monica and San Pedro. On the comparative advantages for arrival and departure, the board held that there was no essential difference between the sites of San Pedro and Santa Monica. The question of distance from Los Angeles was declared to be unimportant . . . On the question of construction, after going into all details, it was declared in substance that the cost of San Pedro would be much less than at either of the locations suggested at Santa Monica". The fact that San Pedro Bay was finally selected does not refute the evidence of use of Santa Monica Bay as a harbor. Nor is the fact that Santa Monica Bay affords less protection from northwesterly winds a controlling consideration. San Pedro Bay, situate on the southerly curve of the peninsula or projection of land formed by Point Vicente and Point Fermin, is open to southeasterly gales, as to which Santa Monica Bay, along the northerly curve of that peninsula,

affords protection. Leading into the latter curve in Santa Monica Bay, a deep canyon, known as Redondo Canyon, provides passage for ships almost to the breakwater line along Redondo beach. Also, oceanward and to the northwest of Santa Monica Bay lie the islands of Santa Cruz and Santa Rosa; and to the southwest, Catalina and San Clemente Islands. The position of the islands undoubtedly affords some protection against gales coming from their direction. In his Century History of Santa Monica Bay Cities, chapter 1, page 11, Ingersoll notes that "the waters of this bay are ordinarily quiet since the force of the waves is broken by the seaward islands and the deep, recessed position of the shoreline". Moreover, the "Rex", which has no motive power of its own, has been anchored at the same point in Santa Monica Bay for the past five or six years. If the question whether Santa Monica Bay is a harbor were important in the solution of the problem presented, the foregoing fact would tend strongly to refute the contentions of the defendant that Santa Monica Bay, as a harbor, is not within the territorial waters of the state.

In discussing the legal sources on the question of what constitutes a bay, the defendant places reliance upon the case of *United States* v. *Morel,* 26 Fed. Cas. 1310, No. 15,807, wherein a distinction was made between high seas, and roads, harbors and ports. After noting the distinctions made by Lord Hale in the fourth chapter De Jure Maris, the Court said: "We see here a clear and reasonable distinction taken between the main sea or ocean, and such parts of its waters as may flow into places so situate and secured by the circumjacent land as to afford a harbor or protection for vessels from the winds, which make the sea dangerous. The open sea, the high sea, the ocean, is that which is the common highway of nations, the common domain, within the body of no country, and under the particular right or jurisdiction of no sovereign, but open, free, and common to all alike, as a common and equal right". And, quoting from Lord Hale, the court continued "The

expression (high seas) describes the open ocean where the dominion of the winds and waves prevails without check or control. Ports and harbors, on the contrary, are places of refuge in which protection and shelter are sought, within the enclosures and projections of land." It is obvious that the extent of the harborage offered by the places so described will vary; but mere variations which become apparent in making comparisons with other harbors may not preclude judicial recognition of Santa Monica Bay as a harbor, in view of its geographic conformation and the history of its uses as such.

[4] Furthermore it does not appear that the law of nations defines, circumscribes or restricts the character of a body of water which may be included within the territorial boundaries of a country in accordance with the defendant's contentions. * * * * *

In line with the foregoing considerations the Bay of San Pedro (*United States* v. *Carrillo*, 13 Fed. Supp. 121), and Monterey Bay (*Ocean Industries, Inc.* v. *Superior Court*, 200 Cal. 235 (252 Pac. 722)), have been judicially recognized as territorial waters of the state. There is not such a difference between the configuration and expanse of those bays and of Santa Monica Bay as would compel the invocation of the "rule of reason" referred to in the Carrillo case, for the purpose of rejecting the contention that Santa Monica Bay is within the territorial boundaries of California. That rule of reason does not persuade us to conclude that the waters of Santa Monica Bay, per se, beyond three miles from the shore, constitute a part of the open or high seas. We are not here concerned with a body of water comparable to the Behring Sea, or to the Gulf of Mexico mentioned as an example in the Carrillo case.

We conclude that geographically the waters known as Santa Monica Bay conform to the definition of a bay; that historically for a period of at least 400 years they have been known as a bay and during a large portion of that period have been used as a harbor; that the claimed juris-

diction of the executive department of the state is in conformity with the law of nations; therefore, that Santa Monica Bay is one of the bays and harbors included within the territorial boundaries of the state by the Constitution. It follows that the jurisdiction of the state extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vicente and Point Dume, and at least for a distance of three miles oceanward from that line, and that such jurisdiction may be exercised by the state for all proper purposes including the prosecution of violators of the penal laws of the state.

The Judgment and the order are and each is affirmed.

Curtis, J., Waste, C. J., Gibson, J., and Carter, J., concurred.

Houser, J., did not participate in the foregoing decision.

United States v. Carrillo, 13 F. 2d 121 (S. D. Cal., 1935).

STEPHENS, District Judge.

"The defendants were on trial under indictment alleging in four separate counts that they conspired to commit acts of piracy and to rob and plunder, and that they did commit acts of piracy and did rob and plunder a gambling vessel, the Monte Carlo, anchored off the shore of California.

"This is a motion to dismiss all counts of the indictment upon the ground that the court should take judicial knowledge that the vessel allegedly robbed was within the territory of the state of California at the time of the alleged robbery.

"(1, 2) The state of California was admitted into the nation of the United States shortly after the territory within its limits had become unquestionably American through the Treaty of Guadalupe Hidalgo as it was proclaimed July 4, 1848, by the President of the United States. It may be claimed that California was an independent nation for a short time from the raising of the Bear Flag at Monterey to the admission into the Union, but as a functioning gov-

ernment it never was recognized by other nations. No territorial government was ever established by the United States for California. It may be said, therefore, that the government under the California Constitution of 1849 succeeded the Mexican sovereignty with all of its rights, and, of course, the Mexican sovereignty succeeded the Spanish sovereignty.

"There is, strictly speaking, no law between nations, except that which is agreed upon between them through treaties, and sovereignty with its geographical limits is, in the main, a question of dominion. From a very early date nations have generally acquiesced in the proposition that a nation's territory over which its sovereignty extends ends 3 miles from and into the bordering ocean. *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 P. 722. Such three miles was not a line following the exact contour of the coast, which would seem impracticable, but was three miles from the line joining headlands or points between which the indentations or bays. But a moment's thought upon the subject is sufficient to cause appreciation of the fact that the rule of reason must be read into this formula. As, for instance, if the whole of the land bordering the Gulf of Mexico were under one sovereignty the whole of such vast sea could not well be considered as within such country's sovereignty. The practice of governments, explorers, geographers, etc., has generally confined such formula to bays which are not in fact open sea, and so the coasts of the continents have been mapped, the points between which the sea curves inward have been designated, and the waters between such points have been designated as bays. A consultation of the old discovery and navigation maps of the Spaniards, and as well the English, will show this to have been the practice on the Pacific Coast of North America, and it does not appear to have been disturbed by the Mexican sovereignty. See citation to maps herein. The Constitution of California (Const. Cal. 1849, art. 12) in its boundary description provides that the 3-mile

limit shall be followed, and that the bays and harbors along the coast are included. It would seem to follow logically that United States national and California state sovereignty have always been in accord with this rule. See *Ocean Industries, Inc.* v. *Superior Court, supra,* wherein the question is treated and authorities cited. Ancient and more modern maps, as well as maritime publications of the United States government, have referred to the Bay of San Pedro as being that portion of the Pacific Ocean lying between the bluffs, now the site of the city of Huntington Beach, and until lately called Point Lasuen, on the east and Point Firmin on the west. The Pacific Coast Pilot, 1889, official government publication; Map of coast 'San Diego to Santa Rosa Island,' U. S. C. & G. S. No. 5101; 'Pacific Coast, San Diego to Santa Monica, including Gulf of Santa Catalina, Cal.,' U. S. C. & G. S.; the following maps at University of California; Spanish N. A. drawn for Thompson's New General Atlas of 1814; Map marked 'Carte de La de L'Amerique'; Map Vancouver Chart Coast of N. W. America; Rand-McNally's Atlas 1878 and 1899. Between these points the coast curves inward, and between them (except for detached hills) are lowlands, inlets and lagoons into which several torrential streams flow from the mountains some 20 or 30 miles inland.

"It seems, therefore, and I so decide, that the Bay of San Pedro is that body of water lying landward from a line drawn from Point Lasuen to Point Firmin, and that the sovereignty of the United States and the territory of the state of California extends three miles to seaward from such line. The same conclusion was reached by the Appellate Department of the Los Angeles County California Superior Court in Criminal Appeals No. 734, *People* v. *Haskel.*"

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